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No. 90-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BOROUGH OF ROSELLE, FELIX GRABOWSKI and WILLIAM SCHWARTZ,

Petitioners,

vs.

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, under the doctrine of pendent appellate jurisdiction, may determine issues fairly presented in the record beyond the issue of qualified immunity in an appeal taken from a denial of a summary judgment motion based upon qualified immunity in accordance with *Mitchell v. Forsyth*, 472 U.S. 511 (1985) and, if so, to what extent.

2. What factors are to be used in determining whether a denial of a summary judgment motion based upon state law immunity constitutes a "final decision" for purposes of 28 U.S.C. §1291, in accordance with the principles set forth in *Mitchell v. Forsyth*.

THE PARTIES

In addition to the parties named in the caption, the following were defendant-appellees: Vincent F. Trolan and the Roselle Police Department.

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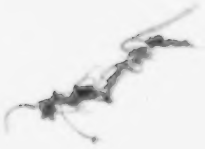

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Borough of Roselle, Felix Grabowski and William Schwartz, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on December 31, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 922 F.2d 1097 (3d Cir. 1990). The opinion of the United States District Court for the District of New Jersey is unreported. Both opinions are reproduced in the Appendix.

JURISDICTION OF THE SUPREME COURT

The Court of Appeals entered judgment on December 31, 1990. (App. at A-1, A-47 to A-49) Petitioners timely Petition for Rehearing and/or Rehearing In Banc was denied on January 29, 1991. (App. at A-52 to A-53) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1291 of the Judicial Code, 28 U.S.C. §1291, provides in pertinent part:

> The courts of appeal...shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

Section 5-5 of the New Jersey Tort Claims Act, N.J.S.A. 59:5-5 provides:

> Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.

STATEMENT OF THE CASE

A. *Factual Background*

This matter arises from a civil rights suit filed in the United States District Court for the District of New Jersey.

On Saturday January 12, 1985, Debbie Evans went to the Roselle, New Jersey Police Department to report that she had been kidnapped and raped by her former boyfriend, Clifton McKenzie. Petitioner Officer William Schwartz took an initial statement from Ms. Evans. He wrote his report and turned the report, and the investigation, over to Petitioner Det. Felix Grabowski in accordance with Roselle Police Department procedures. Officer Schwartz had no further involvement in the matter.

Det. Grabowski interviewed Ms. Evans, then contacted Assistant Union County Prosecutor William Daniel to discuss the filing of indictable offense complaints against Mr. McKenzie.[1] Mr. Daniel came to Roselle Police headquarters and discussed the matter with Det. Grabowski. Daniel preliminarily recommended filing charges against McKenzie for sexual assault and kidnapping, but directed Det. Grabowski to take a formal statement from Ms. Evans and to let him know if anything in her story changed.

Thereafter, Det. Grabowski took a formal statement from Ms. Evans, in which she recounted her experience with Mr. McKenzie while she had been held against her will. One of the

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[1] Under a procedure then in place in Union County, police officers could not file indictable complaints without approval of the prosecutor's office.

The New Jersey Code of Criminal Justice abolished common law crimes and enacted statutory indictable offenses and disorderly person offenses. These categories roughly coincide with common law felonies and misdemeanors, respectively.

final questions asked by Det. Grabowski was whether Ms. Evans could have escaped during the ordeal. She replied she could have escaped on several occasions, but she did not because she did not want to leave her keys behind.

Following the formal statement, Det. Grabowski sent Ms. Evans home with her sister and brother and instructed her to come back on Monday when the Municipal Court was open to file charges against Mr. McKenzie for stealing her purse. After Ms. Evans left, Det. Grabowski contacted Prosecutor Daniel regarding the filing of indictable complaints. Det. Grabowski told Daniel that Ms. Evans had stated she could have escaped on several occasions. Based upon that information, Daniel recommended against the filing of indictable complaints.

Ms. Evans did not return to Roselle Police headquarters the following Monday to file charges against Mr. McKenzie. Her family reported her missing on that day. She was found in the trunk of her car frozen to death on February 10, 1985.

B. *District Court Proceedings*

Plaintiff filed a five-count Complaint pursuant to 42 U.S.C. §1983 on behalf of Ms. Evans' estate against Officer Schwartz, Det. Grabowski, the Borough of Roselle, the Roselle Police Department,[2] and Roselle Police Chief Vincent Trolan. Count One alleged that the defendants violated Ms. Evans' constitutional right to access to the courts. Count Two alleged that the defendants violated Ms. Evans' constitutional right to police protection. Count Three alleged that the defendants violated Ms. Evans' constitutional right to equal protection of the laws by providing less protection to her because she was a victim of domestic violence. Count Four alleged that Ms. Evans' rights were violated as a result of

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[2] Although the Roselle Police Department was named as a defendant, under New Jersey law, a municipal police department is not an entity separate from the municipality. *See* N.J.S.A. 40A:14-118.

policies, including constitutionally inadequate training, instituted or condoned by Chief Trolan and/or the Borough of Roselle. Count Five alleged a pendant state law claim for negligent failure to provide police protection.[3]

Following discovery, the defendants moved for summary judgment on all claims. The individual defendants argued that they did not violate Ms. Evans' constitutional rights or, alternatively, that plaintiff's claims were barred by qualified immunity. The municipal defendants argued that since Ms. Evans' rights were not violated, they could not be held liable under *Los Angeles v. Heller*, 475 U.S. 796 (1986), and that if Ms. Evans' rights were violated, plaintiff had failed to prove those rights were violated in accordance with a municipal custom or policy. Defendants also moved to dismiss plaintiff's pendant state law claims, arguing they were barred by the immunity provided by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*

The District Court dismissed plaintiff's claim that Ms. Evans' right to police protection was violated on the basis of *DeShaney v. Winnebago County Department of Social Service*, 489 U.S. 189 (1989). The District Court denied the remainder of defendants' motion. It held that the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-1 *et seq.*, created a constitutionally protected right to assistance in gaining access to the civil courts, and that right was clearly established as of January, 1985. The District Court further held that the individual officers had discriminated against Ms. Evans by providing less protection to her because she was a victim of

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[3] Plaintiff had originally also included claims against Asst. Prosecutor Daniel, Union County Prosecutor John Stamler, the Union County Prosecutor's office and Union County in addition to the Roselle defendants. The claims against the prosecutors were dismissed on September 29, 1987 on the basis of absolute prosecutorial immunity. (App. at A-56). That decision is not the subject of the within appeal.

domestic violence, and that the right to be free from such discrimination was clearly established in January, 1985. On the claims against the municipal defendants and Chief Trolan, the District Court held that Roselle had a policy of providing constitutionally inadequate training to provide protection to victims of domestic violence. Finally, the District Court denied defendants' motion to dismiss plaintiff's state law claims. It held that the police officers had ministerial duty to provide police protection and applicable provisions of the New Jersey Tort Claims Act did not provide immunity for negligently performed ministerial duties.

C. *Court of Appeals Proceedings*

Each party appealed that part of the District Court's opinion which was adverse to them. The Court of Appeals reversed the District Court's failure to grant summary judgment dismissing the federal claims against the individual defendants. It held, in accordance with *DeShaney*, Ms. Evans had no constitutionally protected right to assistance in gaining access to the civil courts and the Domestic Violence Act could not create such a right. The Court of Appeals also held that the officers were entitled to qualified immunity because as of January, 1985, there was no clearly established right not to be discriminated against on the basis of being a domestic violence victim. The claims against Chief Trolan in his individual capacity were barred by qualified immunity because it was clearly established in the Third Circuit in January, 1985 that there was no affirmative duty to train or supervise one's subordinates.

The Court of Appeals dismissed defendants' appeal from the District Court's denial of their motion for summary judgment on the basis of the New Jersey Tort Claims Act for lack of jurisdiction. While the Court agreed that such a denial would be an applicable "final decision" for purposes of 28 U.S.C. §1291 if the Tort Claims Act provided immunity from suit in the same way as qualified immunity, after weighing

various factors, it held that the Tort Claims Act provided immunity from liability, not immunity from suit. The Court dismissed the remainder of the appeals for lack of jurisdiction as well.

Petitioners now seek review that portion of the Court of Appeals' decision dismissing their appeal for lack of jurisdiction.

JURISDICTION BELOW

Jurisdiction of this case was proper in the District Court pursuant to 28 U.S.C. §§1331, 1343(a)(3) and the doctrine of pendant jurisdiction. Jurisdiction of the Court of Appeals was proper pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Highlights a Conflict Among the Circuits and Raises Important Questions Concerning the Application of the Doctrine of Pendant Appellate Jurisdiction to Appeals Taken in Accordance with *Mitchell v. Forsyth*

There is a major conflict among the Circuits as to the extent of pendant appellate jurisdiction, ranging among a variety of positions in the different Courts of Appeal.[4] In addition, this Court has never addressed the important question of the application of the doctrine of pendant appellate jurisdiction to appeals taken under *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Court should grant petitioners' writ of certiorari to give guidance to the circuits on the extent to which, and under what circumstances, they may decide issues which are fairly presented in the record on appeal beyond the issue of qualified immunity of individual defendants in civil rights cases.

The Court below held that pendant appellate jurisdiction extends only to otherwise non-appealable issues which are inextricably intertwined with an appealable issue. 922 F.2d at 1106, n.3, App. at A-14, n.3, *citing Kershner v. Mazorkiewicz*, 670 F.2d 440, 449 (3d Cir. 1982). The Seventh Circuit has adopted an even more restrictive standard. In that Circuit, an otherwise non-appealable order must not only be inextricably entwined with the appealable order, but there must also be compelling reasons for not deferring the

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[4] The majority of cases on pendant appellate jurisdiction have arisen in interlocutory appeals of orders regarding injunctions under 28 U.S.C. §1292(a). However, in applying the doctrine of pendant appellate jurisdiction, no court has distinguished between appeals taken under that statute or interlocutory appeals taken under *Mitchell*.

appeal of the non-appealable order to the end of the lawsuit. *U.S. for Use of Valders Stone & Marble v. C-Way Construction Co.*, 909 F.2d 259, 261-262 (7th Cir. 1990).

Other Circuits, as well as leading commentators, have given a considerably broader reach to pendant appellate jurisdiction. For example, in the D.C. Circuit,

> The scope of review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.

Energy Action Educational Foundation v. Andrus, 654 F.2d 735, 745 n.54 (D.C. Cir. 1980) *rev'd on other grounds*, 454 U.S. 151 (1981), *quoting* 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure §3921 at 17 (1977). "So long as the decision on the merits is clear, judicial economy is obviously served by issuing a decision that will terminate or expedite the litigation." *Id. citing Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) *and Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897). Similarly, the Federal Circuit has recognized pendant appellate jurisdiction to review matters which are "ancillary to other matters that are appealable." *Katz v. Lear Siegler*, 909 F.2d 1459, 1461 (Fed. Cir. 1990). "Consideration is given to the extent to which the appealable order involves factors pertinent to the otherwise appealable order, such that the judicial efficiency and the interest of justice are served by review of the ancillary question." *Id.* The Second Circuit has adopted a similar view, recognizing pendant appellate jurisdiction when there is "sufficient overlap" between the appealable and otherwise non-appealable issues. *McCowan v. Sears, Roebuck & Co.*, 908

F.2d 1099, 1104 (2nd Cir. 1990). The Eleventh Circuit has adopted the most open-ended view of pendant appellate jurisdiction, allowing it to be exercised "over non-appealable decisions of the district court when the reviewing court already has jurisdiction in the case." *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1509 (11th Cir. 1990). The Tenth Circuit has offered the following test to determine whether a Court of Appeals may exercise pendant appellate jurisdiction. The factors to be considered on whether to exercise pendant appellate jurisdiction are (1) whether the otherwise non-appealable issue is sufficiently developed, both factually and legally, for review; (2) whether the review of the appealable issue involves consideration of factors closely related or relevant to the otherwise non-appealable issue; and (3) whether judicial economy will be better served by resolving the otherwise non-appealable issue, notwithstanding the federal policy against piecemeal appeals. *State of Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990). In fact, while not explicitly ruling on the question of the scope of pendant appellate jurisdiction, this Court has allowed plenary review of the issues presented in an interlocutory appeal where the record provides sufficient presentation of the legal and factual issues to allow the Court to dispose of the entire case. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986).

As is set forth above, there is not just a conflict between two conflicting positions in the Circuits, but a conflict among opinions running through the entire spectrum of positions on the breadth of pendant appellate jurisdiction. Because of the differing opinions among the Circuits on this issue, and because this is especially important in the area of appeals taken under *Mitchell*, the Court should exercise its supervisory powers in this area to resolve the conflict among the circuits and to set standards for the exercise of pendant appellate jurisdiction generally and particularly in the area of civil rights litigation.

The starting point for determining the extent of appellate jurisdiction in interlocutory appeals in civil rights cases is *Mitchell*, 472 U.S. 511 (1985). In *Mitchell*, the Court held that where a defendant's motion for summary judgment is denied because the District Court determines the defendant is not entitled to qualified immunity, the denial of that motion is an immediately appealable "final decision" for purposes of 28 U.S.C. §1291 under the collateral order doctrine. Thus, where a defendant's motion for summary judgment on qualified immunity is denied, he may appeal that decision as of right. The question presented here is what issues other than qualified immunity, i.e., whether the plaintiff's constitutional rights were clearly established at the time of the offending conduct, may be determined on appeal. There is no question but that no other issues would be immediately appealable, absent an appeal on qualified immunity. *See, e.g., United States v. Spears*, 859 F.2d 284, 286 (3d Cir. 1988) (denial of summary judgment not a final order). Nonetheless, logic and judicial economy dictate that issues beyond qualified immunity be considered in appeals from denials of summary judgment on qualified immunity. Once a case is properly before the Court of Appeals, it is a question of orderly judicial administration, not a question of judicial power, as to what issues beyond the directly appealable issue should be decided on appeal. *See Thornburgh*, 476 U.S. at 757. Because of the diverse standards among the Circuits on the extent of pendant appellate jurisdiction, the Court should set standards so the Courts of Appeal may be guided in determining to what extent orderly judicial administration requires deciding issues other than whether plaintiff's constitutional rights were clearly established at the time of the alleged violation. This question would seem to be constantly recurring in civil rights litigation, and the standards set in this area would be equally applicable to interlocutory appeals taken under 28 U.S.C. §1292(a) from orders dealing with injunctions or other interlocutory appeals.

In its opinion below, the Third Circuit, which uses one of the more narrow standards in exercising pendant appellate jurisdiction, recognized the need to address issues beyond whether the plaintiff's constitutional rights were clearly established at the time of the incident in question.

> It strikes us as both illogical and contrary to the interests of judicial economy to construe *Mitchell* that when a reviewing court determines that a constitutional right allegedly violated could not have been clearly established because it has not been recognized, the court may not directly so hold.

922 F.2d at 1110, App. at A-23 to A-24. *Contra Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989); *Fontane-Rexach v. Puerto Rico Electric Power Authority*, 878 F.2d 1493 (1st Cir. 1988) (Court of Appeals may only decide issue of whether rights were clearly established).

In making a determination of whether the plaintiff's constitutional rights were clearly established, or are established at all, the Court of Appeals, as well as the District Court, may look at discovery materials offered in support of the parties' factual positions, as well as the legal theories presented in the plaintiff's Complaint. *See Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987).[5] In the instant case, for example, the parties relied upon the full deposition transcripts of each of the defendants, as well as those of several other fact witnesses. The facts were "virtually uncontested". 922 F.2d at 1101, App. at A-5. The Court below recognized, as have most other Courts of Appeal, that in addition to determining whether the

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[5] *Accord Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990); *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988); *Turner v. Damon*, 848 F.2d 440 (4th Cir. 1988); *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987); *Trapnell v. Ralston*, 819 F.2d 182 (8th Cir. 1987); *White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986); *DeVargas v. Mason & Hangar - Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Jasinski v. Adams*, 781 F.2d 843 (11th Cir. 1986).

plaintiff's constitutional rights were clearly established at the time of the incident complained of, as well as whether his rights were violated at all, the appellate court must also search the record to determine whether there were genuine issues of material fact so that summary judgment would be proper in the first instance, regardless of the status of the plaintiff's rights.

> We believe that we implicitly have held that *Anderson* requires appellate inquiry into whether the plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to whether the defendant official engaged in the conduct alleged to have violated a clearly established right. We conclude that under *Anderson's* fact specific standard for qualified immunity, as construed and applied by our precedents, we must determine whether the district court properly denied defendants' claims of qualified immunity in part by analyzing the evidence adduced by plaintiff as to the conduct of the defendants.
>
> This evidentiary analysis is governed by the Supreme Court's trilogy of cases defining the quantum of evidence sufficient to enable a non-moving party to survive a motion for summary judgment. The trilogy's basic rule is that a motion for summary judgment will not succeed "if the dispute about a material fact is 'genuine.'" This standard, which mirrors the standard for directing a verdict, requires an inquiry into "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

922 F.2d at 1113, App. at A-25 to A-26. (citations omitted). The Eighth Circuit will consider interlocutory appeals under *Mitchell* on the question of whether there are genuine issues of

material fact on the factual and legal merits of plaintiff's constitutional claims.

> The question presented is thus both less clearly "legal," as opposed to "factual," than the issue in *Mitchell*, and less clearly separable from the merits, one of the requirements for immediate appealability under *Cohen*. We nevertheless hold that an interlocutory appeal is proper. If this is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion. It is important for public officials to be shielded from the burden of trial on insubstantial claims. Their right not to be forced to trial will be lost if an immediately appeal is not allowed.

Wright v. South Arkansas Regional Health Center, Inc., 800 F.2d 199, 203 (8th Cir. 1986). *See also Bolden v. Alston*, 810 F.2d 353, 356-257 (2d Cir. 1987) (Court of Appeals will exercise pendant appellate jurisdiction over merits of plaintiff's constitutional claims where there are no genuine issues of material fact). *But see Chinchello v. Fenton*, 805 F.2d 126, 131 (3d Cir. 1986) (flagging, but not deciding, issue that "I didn't do it" defense may not be subject to interlocutory appeal under *Mitchell*).

On an appeal from denial of summary judgment on qualified immunity grounds, since the Court of Appeals may determine whether a constitutional right exists at all, as well as whether it was clearly established at the time of the incident, and since the Court may examine the record to determine whether there are genuine issues of material fact, judicial economy dictates that the Court of Appeals consider all issues properly raised by the record as to which there are no genuine issues of material fact. To hold otherwise would be to blindfold the appellate courts where justice could be clearly and

efficiently dispensed, thus requiring a trial even where the evidence "is so one-sided that one party must prevail as a matter of law." *See Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). It is a waste of the resources of both the Court and the parties for the Court of Appeals to remand for trial issues which should properly be disposed of by summary judgment and which would most certainly be the subject of a second appeal. This is especially true where, as here, the propriety of summary judgment is adequately presented in the record, the facts are "virtually uncontested", and the legal issues can be decided by the appellate court on the first appeal. When a case is properly before the Court of Appeals, "it would be absurd to require the Court to close its eyes to another interlocutory order which, though not itself appealable, might infect the entire proceeding with error and thus require reversal after large expenditure of judicial and professional time." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 (2d Cir. 1970).

While this case presents its own unique factual and substantive legal issues, procedurally it is quite ordinary for a 1983 case. Plaintiff has alleged three different claims against the individual defendants for violation of constitutional rights, a claim against the municipality alleging that the constitutional rights were violated pursuant to a municipal policy, and a pendant state law claim.[6] The courts below dismissed two of plaintiff's claims against the individual defendants. One count was dismissed because no such constitutional rights existed and the other was dismissed on the basis of qualified immunity. Under *Los Angeles v. Heller*, 475 U.S. 796 (1986), a municipality may not be held liable, regardless of its customs or policies, where the plaintiff's rights were not violated. It would be anomalous that a Court of Appeals could determine that the plaintiff's rights were not violated, and therefore dismiss claims against the individual defendants, but

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[6] The appealability of the state law claim is discussed in section II, *infra*.

at the same time not have the ability to dismiss the claims against the municipal defendant based on the same evidence and legal theory. Further, if a review of the record reveals that there is no genuine issue of material fact as to the municipal policy in question, as well as to the individual defendants' actions, the Court of Appeals should have the power to dismiss the claims against the municipality if the policy did not cause the alleged constitutional violation. If a case can be finally disposed of, or even considerably narrowed, by the Court of Appeals, there is no logical reason to limit the Court's power to do so.

Although the Seventh Circuit's view as to the extent of pendant appellate jurisdiction is overly narrow, its concern over "allow[ing] the doctrine of pendant appellate jurisdiction to swallow up the final judgment rule," *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988), is not misplaced. However, the application of clearly defined standards for the exercise of pendant appellate jurisdiction will preclude the opening of the floodgates for additional appeals. For the doctrine to apply, the appeal must be properly before the Court in the first instance. Pendant appellate jurisdiction controls the number of issues which the Court of Appeals can decide in cases which are already properly before the Court; it does not create a new category of cases in which appeals would be allowed where they were not allowed before.

The three-factor test provided by the Tenth Circuit in *Colorado v. Idarado Mining*, if adopted, would provide standards which would protect the final judgment rule, while at the same time allowing the Courts of Appeal to decide issues which are squarely presented and to dispose of or narrow the case under determination. The Courts of Appeal should also be guided by the principles underlying pendant jurisdiction of state law claims in the District Court. While the District Court has the power to adjudicate state claims arising out of the same series of operative facts, it is not obliged to do so. "It has

consistently been recognized that pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in consideration of judicial economy, convenience and fairness to litigants." *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966). Just as a District Court can decline jurisdiction over state claims when it appears that those claims comprise the main portion of the plaintiff's case, a Court of Appeals may decline to exercise pendant appellate jurisdiction where it appears that the otherwise non-appealable issues "constitute the real body of [an appeal] to which the [appealable] claim is only an appendage." *See Gibbs*, 383 U.S. at 727. Thus, wherever it would appear that the majority of the appellant's case consists of otherwise non-appealable issues, the Court of Appeals could decline to hear those issues to prevent abuse of pendant appellate jurisdiction.

As is set forth above, there is a conflict among the Circuits as to the extent of pendant appellate jurisdiction, with the Courts of Appeal taking a wide variety of positions on the issue. This is an area of the law in which the Court should exercise its supervisory powers because this is a frequently recurring issue that the Court has not previously explicitly addressed. Therefore, petitioners respectfully request that their petition for certiorari to review the decision of the Court of Appeals be granted.

II

The Decision Below Creates a Conflict Among the Circuits on the Factors to Be Considered in Determining Whether Denial of Summary Judgment on State Law Immunity is a "Final Order" Under the Principles of *Mitchell*

The decision of the Third Circuit in this matter created a conflict among the Circuits as do the factors to be considered in determining whether the denial of a motion for summary judgment based upon state law immunity constitutes a "final decision" for purposes of 28 U.S.C. §1291. While all of the Courts of Appeal have agreed that a denial of summary judgment on state law immunity will constitute an appealable final decision if the applicable state law immunity was intended to provide immunity from suit in the same way as qualified immunity under federal law, the Circuits disagree on the factors to be considered in determining whether the applicable state law immunity provides immunity from suit or merely immunity from liability.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1984), the Court held that a denial of summary judgment on qualified immunity was an immediately appealable "final decision".

> *Harlow [v. Fitzgerald*, 457 U.S. 800 (1982)] thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies

> the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Mitchell, 472 U.S. at 520-521 (emphasis in original). Following this reasoning, the Courts of Appeal have held that where applicable state law immunity was intended to provide immunity from suit, not just a defense to liability a denial of summary judgment on state law immunity is an appealable final decision. *See Brown v. Grabowski*, 922 F.2d 1097, 1107 (3rd Cir. 1990), App. at A-16 to A-17; *Haynes v. Marshall*, 887 F.2d 700, 703-704 (6th Cir. 1989); *Newman v. Commonwealth of Massachusetts*, 884 F.2d 19, 27 n.15 (1st Cir. 1989); *Sorey v. Kellett*, 849 F.2d 960, 961-963 (5th Cir. 1988). Where the state law immunity specifically provides that it was intended to provide immunity from suit, the determination of whether a denial of summary judgment on state law immunity is a final decision is an easy one. *See Haynes, supra.; Newman, supra*. However, where the state immunity is unclear as to what type of immunity was intended, at least for purposes of *Mitchell*, the Court of Appeals must examine the policies underlying the applicable immunity in light of *Mitchell* to determine whether a denial of summary judgment on state law immunity is a final decision for purposes of 28 U.S.C. §1291.[7]

The Court below purported to follow the reasoning of *Sorey* and *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th

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[7] Plaintiff may argue that defendants are improperly asking this court to interpret New Jersey statutes. Quite the contrary. Defendants are requesting that the Court set standards to determining whether a decision on state law immunity is a "final decision" under 28 U.S.C. §1291, which is solely a question of federal law. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

Cir. 1986), in determining whether the New Jersey Tort Claims Act was intended to provide immunity from suit or immunity from liability. 922 F.2d at 1106-1107, App. at A-16 to A-17. The factors examined by these Courts included whether the immunity was primarily designed to provide immunity for discretionary activities, whether the immunity was designed to limit liability within clearly defined parameters, whether the immunity was designed to protect public entities and employees from the expense of trial, and the actual language of the immunity provisions. 922 F.2d at 1107-1109, App. at A-16 to A-20; *Sorey*, 849 F.2d 962-963; *Marrical*, 805 F.2d at 173-174. The split between the Third Circuit on one hand and the Fifth and Sixth Circuits on the other arises on an additional factor to be considered in determining whether state law immunity was intended to provide immunity from suit or immunity from liability. The deciding factor for the Court below in determining that the New Jersey Tort Claims Act was not intended to provide immunity from suit was New Jersey's generally "inhospitable" attitude toward interlocutory appeals. 922 F.2d at 1108-1109, App. at A-20 to A-22. On the other hand, the *Sorey* and *Marrical* Courts considered whether the plaintiff's claims could be dismissed on summary judgment before trial in order to protect the defendant against the burdens of litigation. *Sorey*, 849 F.2d at 962; *Marrical*, 805 F.2d at 174. In each of the Circuits, the foregoing factors appeared to be the most decisive in the Court's determination of whether the applicable state law immunity was intended to provide immunity from suit or liability.

The holdings of *Sorey* and *Marrical* provide sound reasoning for the determination of whether state law immunity was intended to provide immunity from suit or from liability. The most important protection for a public official to protect against the burdens of litigation is the ability to have

insubstantial or non-cognizable claims dismissed before trial.[8] The reasoning of the court below is contrary to this Court's holding in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). *Budinich* held that the question of whether an order is a "final decision" for purposes of 28 U.S.C. §1291 is solely a question of federal law, without regard to how the state court in which the District Court sits would handle an identical situation. *Budinich*, 486 U.S. at 198-199. The holding of the court below is directly contrary to *Budinich*, because it allowed the defendants' rights to appeal be governed by state rather than federal law. Thus, not only did the court below create a split among the Circuits on what factors should be considered in determining whether state law immunity provides immunity from suit or from liability, it employed an erroneous view of the applicable law.

For the reasons stated above, the decision of the court below creates a conflict among the Circuits on the factors to be considered in determining whether denial of summary judgment is a final decision under the reasoning of *Mitchell*. This issue would seem to be one which will arise repeatedly and, thus, the Court should give guidance to the Circuits in determining whether state law immunities provide immunity from suit or from liability for purposes of *Mitchell*. Therefore, petitioners respectfully request that their petition for certiorari to review the decision of the court below be granted.

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[8] New Jersey does allow summary judgment before trial based upon the New Jersey Tort Claims Act. *See, e.g., Rochinski v. State of New Jersey, Dept. of Transportation*, 110 N.J. 399, 521 A.2d 1029 (1988); *Lee v. Doe*, 232 N.J. Super. 569, 557 A.2d 1045 (App. Div. 1989).

CONCLUSION

For the reasons contained herein, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit in the captioned matter.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5487, 89-5532

REGINA BROWN, ADMINISTRATRIX and Administratrix Ad Prosequendum of the Estate of DEBBIE EVANS

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE

Felix Grabowski, William Schwartz, Vincent F. Trolan, and the Borough of Roselle, *Appellants in 89-5487*

Regina Brown, *Appellant in 89-5532*

On Appeal From the United States District Court for the District of New Jersey (D.C. Civil No. 86-4895)

Argued: January 16, 1990

Before: BECKER, GREENBERG and NYGAARD, *Circuit Judges*

(Filed December 31, 1990)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

Deborah Evans was found frozen to death in the trunk of her car in February of 1985 in a motel parking lot in Iselin, New Jersey. Clifton McKenzie, Evans' former live-in boyfriend, had abducted her and imprisoned her there. In a separate episode, which occurred shortly before this fatal abduction, McKenzie had held Evans hostage for a period of three days, during which he repeatedly threatened and sexually assaulted her. During the weekend following this preliminary reign of terror, members of Evans' family and Evans herself related these events to Patrolman William Schwartz and Detective Felix Grabowski of the Police Department of Roselle

Borough, where Evans lived and where most of the events took place. Despite the entreaties of Evans and her family, however, no criminal charges against McKenzie were filed.

These cross-appeals are from the district court's summary judgment rulings in a civil rights case that Evans' personal representative brought against the Borough and employees of its police department. This action is based upon allegations that, but for the sloth and callousness of the department in general and of Detective Grabowski in particular, Evans' death would not have occurred. Plaintiff asserts that the defendants, discriminatorily and through willful neglect, denied Evans her constitutional rights to due process and of access to the civil and criminal courts. Plaintiff further alleges that the Roselle Police Department had a long-standing policy of inaction in domestic violence cases, motivated by discrimination against women, leading to a violation of Evans' equal protection rights.

Because of the absence of finality, we lack appellate jurisdiction over several of the district court's orders granting or denying summary judgment with respect to plaintiff's federal claims. Deciding a question of first impression in this circuit, and influenced by New Jersey's inhospitability to interlocutory appeals, we conclude that the doctrine of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), does not provide us with jurisdiction to entertain the appeals by the defendant police officers from the denial of their motions for summary judgment, on grounds of qualified immunity, with respect to plaintiff's *state* law claims. Under *Mitchell*, however, we plainly have appellate jurisdiction over the appeals of Detective Grabowski, Officer Schwartz, and Roselle Police Chief Vincent Trolan (in his individual capacity) from the district court's denials of their motions for summary judgment invoking qualified immunity as a defense to several of plaintiff's *federal* claims.

Our qualified immunity inquiry presents a novel question concerning the scope of review of the district court's decisions denying defendants' claims of qualified immunity. We

conclude that, in determining whether the district court properly denied defendants' claims of immunity, we may consider not only whether the rights that defendants are claimed to have violated were clearly established at the time of their contact with Evans, but also whether they were established at all. In addition, we construe *Anderson v. Creighton*, 483 U.S. 635 (1987), and our own precedents to require that we engage in an analysis of the facts adduced concerning defendants' conduct — and not only the pleadings — in determining whether they are entitled to qualified official immunity.

On the merits, plaintiff's claim of denial of access to the civil courts presents us with some difficulty. In framing this cause of action, plaintiff relies on a New Jersey statute that expands avenues of recourse for victims of domestic violence, requiring that police inform these victims of their right to obtain a restraining order against an attacker in the civil courts. In light of this statute and the egregious inaction of Detective Grabowski, plaintiff presents an appealing case for relief. Ultimately, however, plaintiff's theory that defendants violated Evans' right of access to the civil courts by failing to provide her with the assistance required by New Jersey law is not constitutionally cognizable. The constitutional right of access to the civil courts simply is not expansive enough to encompass the state statutory rights that defendants are claimed to have violated. Plaintiff's theory also runs afoul of the Supreme Court's holding in *DeShaney v. Winnebago County Department of Social Service*, 109 S. Ct. 998 (1989), that a state's failure to take affirmative action to protect a victim from the actions of a third person will not, in the absence of a custodial relationship between the state and the victim, support a civil rights claim. *DeShaney* compels the additional conclusion that plaintiff's civil court access claim does not present a genuine issue of material fact. Consequently, from both a legal and a factual perspective, a reasonable police officer could not have known that by failing to facilitate Evans' access to the civil courts, he was in any way violating her constitutional rights. Accordingly, we must reverse the district

court's denial of defendants' motion for summary judgment on plaintiff's civil court access claim.

The propriety of the district court's refusal to grant summary judgment for defendants on plaintiff's equal protection claim turns on the degree to which the principles set forth in *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988), were clearly established at the time of the events in question. *Hynson* holds that the equal protection clause is implicated when (l) the policy or custom of the police is to provide less protection to victims of domestic violence than to other victims of violence; (2) discrimination against women is a motivating factor; and (3) the plaintiff has been injured by this custom. Although plaintiff might survive defendants' motion for summary judgment had the events in question occurred after *Hynson*, we read that case as announcing a new principle of law in this Circuit. We conclude that the right to equal protection that plaintiff asserts was not clearly established in 1985. Because a reasonable police officer would not have known that he was violating Evans' right to equal protection, Grabowski's and Schwartz's motions for summary judgment based on qualified immunity should have been granted. Further, because there is no evidence of his personal involvement in the actions or matters in question, we must also reverse the district court's denial of summary judgment for Chief Trolan, sued in his individual capacity.

I. FACTS AND PROCEDURAL HISTORY

The facts of this case, which are essentially uncontested, chronicle with numbing detail the disturbing inaction on the part of Roselle's Police Department that led to this tragedy.

Deborah Evans' ordeal began early in January of 1985, when Clifton McKenzie, without permission, left the drug rehabilitation center into which he had been paroled following a conviction on forgery and drug charges. According to McKenzie, he began using heroin and related drugs within four days of leaving his treatment program. Immediately after leaving the center, McKenzie, who previously had lived with

Evans, took up residence in her apartment. Evans objected to McKenzie's presence there and told him that she wanted nothing else to do with him, unless he returned to his rehabilitation program.

Several days after McKenzie took up residence with her, Evans left her apartment and asked a friend, Jan Parker, to retrieve her apartment keys from McKenzie. When Parker arrived at Evans' apartment, McKenzie beat her until she lost consciousness. McKenzie then abducted Parker and drove her to New York City in her car. Once in New York, Parker managed to escape, contacted the New York City Housing Authority Police, and was taken to a hospital.

The Housing Authority Police immediately reported the incident to the Roselle Police Department, where the investigation of the assault and kidnapping of Jan Parker fell to Detective Felix Grabowski, now a defendant in this case. Based on his conversations with a Housing Authority patrolman, the doctor who treated Parker, and Parker herself, Grabowski determined that there was probable cause to believe that McKenzie had committed aggravated assault, kidnapping, and car theft. Grabowski did not seek to obtain a warrant for McKenzie's arrest, however, and merely advised Parker to come to Roselle Police Headquarters upon her release from the hospital to give a formal statement that would support the issuance of a criminal complaint.

On the same day that he assaulted and abducted Jan Parker, McKenzie returned to Roselle for Deborah Evans, who would receive even less help than did Parker from the local police. McKenzie asked Evans to drive him back to the drug rehabilitation center, but instead abducted her. After forcing Evans to let him drive, McKenzie made her get out of the vehicle in the middle of the Pulaski Skyway, assaulted her, and then threatened to throw her from the top of the Skyway bridge. That night, McKenzie drove Evans back to her apartment. Except for taking Evans on an excursion to withdraw money from her bank account for a drug purchase, McKenzie held her there against her will for the next three

days, constantly monitoring her actions and refusing even to permit her to answer her telephone. During this time, McKenzie sexually assaulted Evans twice. In addition to slapping Evans a number of times, McKenzie also threatened her with a butcher knife, indicated that he soon would kill her, forced his fingers into her mouth, and, placing his hands over her mouth, pinned her to her couch. Evans' three-day ordeal came to an end only when, against McKenzie's instructions, she opened her apartment door to her brother and sister and McKenzie fled through the bathroom window of her apartment, taking her purse with him.

Evans' brother and sister, who had contacted the Roselle Police Department a total of five times during the three days of Evans' disappearance, accompanied her to the Roselle Police Station. There, Evans briefly recounted her story to defendant Patrolman William Schwartz. Schwartz made a preliminary report and referred the matter to Grabowski, who, with a second detective, interviewed Evans. The two detectives then met with the Borough's assistant prosecutor, William Daniel, who instructed Grabowski to elicit a formal statement from Evans to support the filing of a criminal complaint against McKenzie.[1]

In the course of providing her formal statement, Evans, in addition to relating what had befallen her during the previous three days, informed Grabowski that she had, in the past, lived intimately with McKenzie. Grabowski concluded that this prior relationship between the two undermined Evans' assertion that McKenzie had kidnapped and sexually assaulted her. In response to questioning from the detectives in the immediate

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[1] Under New Jersey law at the time, police were required to obtain the approval of a county prosecutor prior to filing a charge for an indictable offense. It was not necessary, however, for either the police or a victim to obtain such approval prior to filing a nonindictable disorderly persons complaint.

aftermath of her trauma, Evans also stated that she believed she could have escaped from McKenzie on several occasions, but that she had remained with him because she wanted her keys back. Although he believed that McKenzie had held Evans for three days, often at knife point, Grabowski evidently concluded that Evans' responses further undermined possible kidnapping and sexual assault charges against McKenzie. Because Evans reported that she had showered before arriving at the police station, Grabowski also concluded that it would be difficult to establish sexual assault charges.

Unable to reach Assistant Prosecutor Daniel for advice on whether to lodge kidnapping and sexual assault charges against McKenzie, Grabowski told Evans to return to the police station on the Monday two days hence to file charges, the nature of which he did not specify. There is conflicting testimony as to whether Grabowski ever intended to lodge these charges. It is clear, however, that he did not inform Evans of her rights under New Jersey's Prevention of Domestic Violence Act, in particular, her right, as a victim of domestic violence, to obtain a restraining order against McKenzie from the Juvenile and Domestic Relations court, even on a weekend.[2]

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[2] The Domestic Violence Act provides:

A law enforcement officer shall disseminate to the victim the following notice, which shall be written in both English and Spanish:

"You have the right to go to the Juvenile and Domestic Relations Court and file a complaint requesting relief including, but not limited to the following: an order restraining your attacker from abusing you or directing your attacker to leave your household. You may request that the clerk of the court assist you in applying for this order. You also have the right to go to court and file a criminal complaint.

"On weekends, holidays, and other times when the courts are closed, you may go to the municipal court for an emergency order granting the relief set forth above."

N.J. Stat. Ann. § 2C:25-7 (1982) (Add. 5)

After Evans had left the police station, Grabowski succeeded in reaching Assistant Prosecutor Daniel. Grabowski told Daniel that kidnapping and sexual assault charges against McKenzie would be difficult to prove. Grabowski did not, however, actually read Evans' statement to Daniel. Based upon Grabowski's characterization of the case, Daniel agreed that there was no probable cause to charge McKenzie. Daniel later concluded that, had Grabowski read Evans' entire statement to him, he would have authorized the filing of the kidnapping and sexual assault charges.

Grabowski testified that the Roselle police made an effort to find McKenzie during the weekend, but conceded that they made no attempts to arrest him. Although Grabowski further testified that protection would have been forthcoming had Evans requested it, he also testified that no patrol units were assigned to protect her.

On the Monday following the weekend, Evans left her mother's house, where she had stayed for the weekend, to renew her efforts to file a complaint against McKenzie. She did not reach the police station, however, and was never again seen alive. McKenzie once more abducted Evans and ultimately placed her, unconscious, in the trunk of her car, where she froze to death. Evans' body was discovered nearly a month later, still in the trunk of her car, which was parked outside of a motel where McKenzie had overdosed on drugs. McKenzie, whose testimony revealed remorse and suggested that he may have experienced drug-induced rages and "black-out" periods during the time he terrorized Evans and Parker, subsequently was convicted of kidnapping and first degree murder.

This incident constituted one of the factors that prompted an investigation of the Roselle Police Department's Detective Bureau by the Union County Prosecutor's Office. Vincent Trolan, the Roselle Police Chief, resigned within a year of the mishandling of Evans' case. The prosecutor's investigation report stated that the Roselle Police Department's Detective Bureau was "completely unsupervised." In response to this investigation, Chief Trolan had prepared reports detailing the

activities of the Department's detective division. The Prosecutor's Office concluded that it was "obvious that the accomplishments cited . . . for each month varied greatly from the amount of work actually performed by the bureau." Filed reports, moreover, were available for only 31 of the 747 cases assigned to the Roselle Detective Bureau as a whole. The Prosecutor's investigation also produced evidence of a long-standing failure to follow up on reports of domestic violence. Indeed, the Department had no records whatsoever of crimes involving domestic violence. Grabowski later stated that he never had filed a domestic violence report and could not recall informing specific victims of domestic violence of their rights under the Domestic Violence Act.

Following Evans' death, her sister and personal representative, Regina Brown, brought this five-count civil rights action. The first four counts, bottomed on 42 U.S.C. § 1983, allege that defendants, including Detective Grabowski, Patrolman Schwartz, Chief Trolan (in both individual and official capacities), the Roselle Police Department, and the Borough of Roselle, violated Evans' constitutional rights. The first count alleges that Grabowski and Schwartz, through failing either to file criminal charges against McKenzie or to assist Evans in obtaining the restraining order available to her under the New Jersey Domestic Violence Act, unlawfully interfered with and denied Evans her constitutional right of access to the judicial system. The second count alleges that Grabowski and Schwartz, by breaching an affirmative duty of protection that arose from a special relationship with Evans, violated her constitutional right to due process. The third count alleges that Grabowski and Schwartz afforded Evans inadequate protection because she was a victim of domestic violence and thereby violated her constitutional right to equal protection. The fourth count, which names as defendants Chief Trolan, in both his individual and official capacities, the Roselle Police Department, and the Borough of Roselle, alleges that these defendants, through deliberate indifference to the consequences of failing to train and supervise their officers adequately, violated Evans' right of access to the judicial system, as well as her other due process and equal protection

rights. The fifth count asserts pendent tort claims under New Jersey common law.

After a period of discovery, Grabowski and Schwartz moved for summary judgment on all five counts of plaintiff's complaint. The district court held that these defendants were entitled to summary judgment on count two of the complaint based upon *DeShaney*, 109 S. Ct. at 998. Under *DeShaney*, the state has a "special relationship" with an individual, creating a constitutionally enforceable duty of protection, only when it has deprived that individual of liberty and, thus, the freedom to act on his or her own behalf. The court concluded that no such special relationship existed with respect to Evans. Plaintiff appeals the grant of summary judgment for defendants on this claim.

The district court dealt with the court access claim in count one of the complaint in two separate proceedings. In an early proceeding on defendants' motions to dismiss various claims, the district court drew a distinction between Evans' alleged constitutional right to bring criminal charges and her asserted constitutional right, arising from state legislation coupled with the right to due process, to receive assistance in bringing a civil action. The district court dismissed the component of count one alleging that Grabowski and Schwartz denied Evans' right of access to the criminal courts, emphasizing that, under *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), a private citizen clearly lacks a judicially cognizable interest in the criminal prosecution of another. The court held, however, that plaintiff stated a cognizable claim that Evans was denied her constitutional right of access to the *civil* courts and therefore did not dismiss count one in its entirety.

In the proceeding on the motions for summary judgment, the district court denied defendants' claim of qualified immunity with respect to the civil court access claim. The district court held that New Jersey's Prevention of Domestic Violence Act, in tandem with the due process clause of the fourteenth amendment, creates a constitutional right on the part of victims of domestic violence to receive police assistance in

gaining civil court access and that Evans' situation clearly fell within the ambit of the Domestic Violence Act. The court further held that Grabowski's and Schwartz's knowledge of Evans' danger, in conjunction with general publicity about the plight of victims of domestic violence, was sufficient to put these defendants on notice that they had a constitutional duty to assist Evans in gaining access to the civil courts. The court concluded that this notice barred them from obtaining summary judgment on qualified immunity grounds.

The district court also held that plaintiff had adduced sufficient evidence of a pattern of deliberate indifference or a discriminatory policy or custom directed toward victims of domestic violence to survive defendants' motion for summary judgment on her equal protection claim. Additionally, the district court ruled against defendants on their motion for summary judgment raising the defense of qualified immunity to this claim, concluding that plaintiff's allegations of a pattern of discrimination on the part of Grabowski and Schwartz against victims of domestic violence could permit an inference of their intent to discriminate.

The court next considered whether summary judgment should be granted on plaintiff's claim that the Roselle Police Department, the Borough of Roselle, and Chief Trolan, in both his individual and official capacities, ultimately are liable for the deprivation of Evans' constitutional rights. The court concluded that because plaintiff had sufficiently substantiated her allegation that the misconduct of Schwartz and Grabowski was both causally connected to Evans' death and attributable to a municipal plan or policy evincing deliberate indifference to the constitutional rights of domestic violence victims, defendants were not entitled to summary judgment on this claim.

Finally, the district court held that summary judgment should not be granted for defendants on plaintiff's pendent state claim that Chief Trolan, the Roselle Police Department, and the Borough of Roselle caused Evans' death through a negligent and wanton disregard for her safety that amounted to

a breach of their duty to protect her. The court concluded that defendants' investigative and protective duties to Evans were of a ministerial type not shielded by New Jersey's Tort Claims Act.

The court further concluded that, notwithstanding the Tort Claims Act's provisions shielding discretionary decisions concerning arrests and the provision of police protection, the Domestic Violence Act subjected defendants to potential liability for failure to perform the nondiscretionary functions of ensuring that Evans knew her rights as a victim of domestic violence and of providing her with any necessary assistance in securing court protection.

II. APPELLATE JURISDICTION

It is clear that we have jurisdiction over the interlocutory appeals of Grabowski, Schwartz, and Trolan, sued in his individual capacity, based upon the defense of qualified immunity that these defendants have asserted in response to plaintiff's civil court access, equal protection, and deliberate indifference claims. Under *Mitchell v. Forsyth*, 472 U.S. at 511, which holds that qualified immunity from federal claims encompasses not only immunity from liability, but also immunity from suit, a decision denying a claim of qualified immunity, and thereby vitiating the entitlement not to stand trial, is immediately appealable.

Equally clearly, we lack jurisdiction over the appeals by Chief Trolan, in his official capacity, the Roselle Police Department, and the Borough of Roselle from the district court's refusal to grant summary judgment on plaintiff's claim that these defendants denied Evans her constitutional rights through failing to train and supervise their police officers adequately. Denials of motions for summary judgment generally are not final orders. *United States v. Spears*, 859 F.2d 284, 286 (3d Cir. 1988); *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (enunciating collateral order doctrine applicable to a "small class" of cases, but emphasizing that 28 U.S.C. § 1291 generally does not

"permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge"). The Borough of Roselle is the real party in interest with respect to plaintiff's claims against Chief Trolan, in his official capacity, and the Roselle Police Department, and the Borough cannot assert a qualified immunity defense so as to qualify, under *Mitchell*, for review of the district court's summary judgment ruling. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (under section 1983, a municipality has no immunity from liability for violations of constitutional rights).

It is clear, in addition, that we lack jurisdiction to review: (1) the district court's dismissal of the component of plaintiff's court access claim that alleges that Grabowski and Schwartz denied Evans' constitutional right of access to the criminal courts; and (2) the district court's grant of summary judgment for Grabowski and Schwartz on plaintiff's claim that the officers violated Evans' right to due process by breaching their duty to protect her. Other claims remain pending in the district court, and plaintiff did not obtain certification with respect to either claim under rule 54(b), even if she could have done so. *See* Fed. R. Civ. P. 54(b) (requiring an "express determination" that fewer than all claims in action may be appealed and an "express direction" for entry of judgment).[3]

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[3] The doctrine of pendent appellate jurisdiction also fails to supply the missing jurisdictional ground for reviewing the district court's decisions as to these claims. Under this doctrine, an appellate court may assert jurisdiction over a claim that neither is certified pursuant to Fed. R. Civ. P. 54(b) nor falls within the small class of claims covered by the collateral order doctrine only if the claim is inextricably intertwined with another claim over which the court properly has jurisdiction. *See Kershner v. Mazurkiewicz*, 670 F.2d 440, 449 (3d Cir. 1982) (holding pendent class certification order appealable under doctrine of pendent appellate jurisdiction only if "inextricably bound" to related issue appealable pursuant to 28 U.S.C. § 1292). Defendants' appeal asserting qualified immunity with respect to plaintiff's civil court access claim may be resolved without reference to the propriety of the district court's decision to dismiss plaintiff's related criminal court access claim. We also need not

(Footnote continued)

Whether we have jurisdiction to review the district court's denial of qualified immunity to defendants on plaintiff's pendent state tort claims is a much more difficult question. This overarching question actually devolves into two inquiries: (l) a predicate inquiry into whether the federal law of qualified official immunity ultimately governs appealability in this instance; and (2) a subsequent inquiry into the nature of the qualified immunity that New Jersey law confers upon state officials.

The Supreme Court's decision in *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), necessitates our predicate inquiry. In *Budinich*, the Supreme Court held that the procedural rule of finality of 28 U.S.C. § 1291 — not rules of finality supplied by state law — should govern appealability even in diversity cases. One implication of the Court's decision in *Budinich* is that our decision on the appealability of the district court's denial of defendants' motion for summary judgment should be governed solely by section 1291 as interpreted in *Mitchell*.

As we have noted, *Mitchell* holds that qualified official immunity with respect to federal statutory and constitutional claims constitutes an immunity from suit, as well as a defense to ultimate liability. In contrast to decisions that solely concern immunity as a defense to liability, decisions that concern immunity from suit fall within the small class of appealable decisions, carved out by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546, that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *See Mitchell*, 472 U.S. at 527-29. A decision denying summary judgment to an official asserting immunity from both litigation and liability in response to a federal claim, like a

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analyze the district court's decision to grant summary judgment for the defendants on plaintiff's due process claim in order to resolve the other appeals over which we have concluded we have jurisdiction.

decision denying summary judgment on a double-jeopardy claim of right not to stand trial, *see Abney v. United States*, 431 U.S. 651 (1977), involves "a right [that] cannot be effectively vindicated after the trial has occurred." *Mitchell*, 472 U.S. at 525. This is because "the essence of [such] immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Id.*

The Fifth and Sixth Circuits have considered the possibility that *Mitchell*'s doctrine of appealability should govern in federal cases, like this case, that involve denials of claims of qualified official immunity based upon *state* law. *See Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988); *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986). As both circuits noted, the parties in a diversity action, or in a federal action such as this one involving pendent state claims, are bound by federal procedural rules governing appeals, including the collateral order doctrine. *Sorey*, 849 F.2d at 962; *Marrical*, 805 F.2d at 172; *see Budinich*, 108 S. Ct. at 1717; *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 541. However, we agree with each circuit that a *Mitchell* analysis, coupled with the teaching of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), dictates that

> the right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended an underlying substantive right to be free from the burdens of litigation arising from acts taken in the course of [official] duties.

Marrical, 805 F.2d at 172; *see also Sorey*, 849 F.2d at 962 (quoting and agreeing with above reasoning).

Our conclusion that the denial of a claim of qualified immunity premised upon state law is appealable only if the state has conferred an underlying substantive immunity from suits arising from the performance of official duties consequently necessitates an inquiry into whether New Jersey extends such an immunity to its officials. We must seek an

answer to this question in New Jersey's Tort Claims Act and the cases that construe it. We think that we also may look to New Jersey's doctrine and procedural rules concerning interlocutory appeals in resolving this question. Although, as we have emphasized, federal procedural rules govern appealability in federal cases such as this one, New Jersey law concerning interlocutory appeals is useful insofar as it sheds light on whether a substantive immunity from suit exists for officials under New Jersey statutory and common law. *See Sorey*, 849 F.2d at 962 (concluding that state procedural rules were useful for same purpose).

Unfortunately neither the text of the New Jersey Tort Claims Act nor New Jersey case law directly addresses the substantive issue whether state officials possess qualified immunity from suit or may only assert qualified immunity as a defense to liability.[4] In order to determine whether New Jersey law provides state officials with immunity from litigation, therefore, we must look to these two sources of New Jersey law and draw inferences from the policies that they express.

The policies undergirding the Supreme Court's decision in *Mitchell* arguably can be discerned in the New Jersey Tort Claims Act. The price of refusing to confer upon public officials immunity from suit as well as from ultimate liability for their reasonable actions is high. In the words of the Supreme Court in *Harlow v. Fitzgerald*, quoted at length in *Mitchell*, this price includes " 'the general costs of subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.' " *Harlow*, 457

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[4] We also note that no case law on this point has evolved under California's Tort Claims Act, on which the New Jersey Act was based. *See Rochinsky v. State of N.J. Dep't of Transportation* 110 N.J. 399, 407, 541 A.2d 1029, 1033 (observing that in various sections of its Tort Claims Act, New Jersey expressly adopted reasoning embodied in the California Tort Claims Act); *Lee v. Doe*, 232 N.J. Super. 569, 581, 557 A.2d 1045, 1050 (1989) (same).

U.S. 800, 816 (1981), *quoted in Mitchell*, 472 U.S. at 526. The Task Force on the Tort Claims Act implicitly may have recognized these "costs" when it acknowledged a hand-in-glove relationship between effective government and official immunity from suit for discretionary decisions[5] and declared that "'it cannot be a tort for the government to govern.'" N.J.S.A. 59:2-3 Task Force Comment, *quoting Amelchenko v. Freehold Borough*, 42 N.J. 541, 550, 201 A.2d 726, 731 (1964).[6]

That the Tort Claims Act was intended to confer a *Mitchell*-type immunity from suit upon public officials might also logically be inferred from the Act's primary and secondary purposes. The New Jersey Supreme Court has emphasized that "the plain meaning of [the statute] firmly establishes that 'immunity is the dominant consideration of the Act.'" *Rochinsky v. State of N.J. Dep't of Transp.*, 110 N.J. 399, 408, 541 A.2d 1029, 1034 (citations omitted). In light of this overriding purpose, the inference that the Act also confers immunity from having to litigate the consequences of reasonable actions seems strong.

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[5] To the extent that the Tort Claims Act is intended to confer official immunity, it seems primarily intended to confer such immunity for discretionary, as opposed to ministerial, actions. The New Jersey Supreme Court has held, however, that immunity for some ministerial acts exists under state law. *Rochinsky*, 110 N.J. at 1029, 541 A.2d at 1029; *see e.g., Malloy v. State*, 76 N.J. 515, 388 A.2d 622 (1978) (interpreting N.J.S.A. 59:2-5, which confers immunity upon public entities for potential liability arising from the issuance, denial, suspension, or revocation of permits and licenses); *Wuethrich v. Delia*, 155 N.J. Super. 324, 382 A.2d 929, *certif. denied*, 77 N.J. 486, 391 A.2d 500 (1978) (construing N.J.S.A. 59:5-4 and 5-5, respectively concerning immunity from liability for failure to provide police protection and failure to make an arrest).

[6] The Task Force Comments on the Tort Claims Act have the precedential weight and value of legislative history. *Rochinsky*, 110 N.J. at 407 n.4, 541 A.2d at 1033 n.4 (1988).

The secondary purpose of the Act is to protect against "actions brought in hopes of imposing liability on theories not yet tested in the courts [that] could result in greatly expanding the amount of litigation and the attendant expense which public entities would face." N.J.S.A. 59:2-1 Task Force Comment. *See also Ayers v. Jackson Township*, 106 N.J. 557, 598 (1987), 525 A.2d 287, 308 (emphasizing Act's goal of deterring novel causes of action against public entities in declining to recognize plaintiffs' cause of action for unquantified enhanced risk of disease). Because public entities and officials may incur considerable expense defending against claims for which they ultimately are not found liable, interpreting the Act to confer immunity from suit, in addition to immunity from liability, would seem consistent with this policy of deterring novel causes of action.[7]

The Tort Claims Act's dominant consideration of immunity and policy of deterrence are equally consistent, however, with the view that the Act was intended to shield public officials and entities only from ultimate liability — and *not* initially from suit. Neither the language of the Act nor its legislative history directly addresses the immunity from suit concerns of *Mitchell v. Forsyth* that we previously have discussed. Indeed, all of the many sections of the Act that provide for or negate the immunity of public entities and employees speak solely in terms of immunity from liability and not of immunity from suit. *See. e.g.*, N.J.S.A. 59:2-2 (public entity "is not liable" for injury caused by adopting or failing to adopt or enforce any law); N.J.S.A. 59:3-10 (public employee acting in scope of employment "is not liable" for injury caused by

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[7] We note in this regard that public entities, under New Jersey law, are obligated to defend police officers in suits arising from actions taken within the course of the officers' employment. *See* N.J.S.A. 40A:14-155; N.J.S.A. 59:10-4. Interpreting the Act to confer immunity from suit upon such officers, at least insofar as they are named as defendants in causes of action based on untested theories of liability, could spare public entities the costs of fully defending such suits.

misrepresentation); N.J.S.A. 59:4-8 (neither public entity nor public employee "is liable" for injury caused by condition of any unimproved public property).

New Jersey cases construing the Tort Claims Act also are consistent with the view that the Act was not intended to confer immunity from litigation upon the state's public officials. Although none of these cases address the *Mitchell* issue of immunity from suit, it seems noteworthy that they do speak explicitly in terms of immunity from *liability*. *See e.g.*, *Rochinsky*, 110 N.J. at 408, 541 A.2d at 1034 ("Even when one of the Act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity."); *Lee v. Doe*, 232 N.J. Super. 569, 581, 557 A.2d 1045, 1052 (interpreting section of Act concerning immunity for failure to provide police protection, and corresponding section of the California act on which it was based, to require "grant of immunity from liability").

The stated purpose and policy underlying the Tort Claims Act, as well as the cases construing it, may therefore be interpreted to cut against the view that the Act confers a *Mitchell*-type immunity from suit upon public officials and entities. That the Tort Claims Act and its accompanying case law may be interpreted both to support and not to support a *Mitchell* immunity from suit does not cut powerfully enough against the possibility that the Act provides for a *Mitchell*-type immunity to decide the issue for us. Another factor, however, does.

As we have noted, New Jersey's procedural law concerning interlocutory appeals is relevant to our analysis insofar as it reveals whether a qualified immunity from suit, and therefore the right, provided for in *Mitchell*, to appeal an effective denial of this immunity, exists under New Jersey statutory and common law. Had a New Jersey court denied defendants' motion for summary judgment on plaintiff's tort claims, defendants could obtain appeal only by means of an interlocutory order and a motion for leave to appeal to the Appellate Division of the New Jersey Superior Court. *See* N.J.

Ct. R. 2:2-4. In New Jersey, the power to grant leave to appeal interlocutory orders is "highly discretionary" and "exercised only sparingly" by New Jersey's appellate courts. *State v. Reldan*, 100 N.J. 187, 205, 495 A.2d 76, 86 (1985); *see also* Pressler, Current N.J. Court Rules, Comment 2:2-4. Indeed, a Justice of the New Jersey Supreme Court has observed that the New Jersey court rules reflect a policy that disfavors piecemeal reviews, has cautioned that "[i]nterlocutory review is exercised only in extraordinary cases," and has characterized the attitude of the state's courts toward most interlocutory appeals as "inhospitable." Clifford, *Civil Interlocutory Appellate Review in New Jersey*, 47 Law & Contemp. Probs. 87 (Summer 1984).

We conclude that the New Jersey courts' general reluctance to entertain interlocutory appeals, in tandem with the absence of the clear expression of *Mitchell* concerns in either the Tort Claims Act or the state's case law, tips the balance toward non-appealability of the district court's denial of summary judgment for defendants on plaintiff's pendent claims.[8] We therefore will

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[8] In *Sorey v. Kellett*, a section 1983 action involving a pendent claim governed by Mississippi law, the Fifth Circuit reversed the district court's denial of defendants' motion for summary judgment based upon qualified immunity under state law. 849 F.2d at 961. As in this case, the state's courts had not directly considered whether, under state law, qualified immunity comprehended immunity from suit or merely constituted a defense to liability. The *Sorey* court, however, emphasized the state's common law rule that a successful defense of qualified immunity entitles an official to dismissal before trial. *Id.* at 962. The *Sorey* court also observed that the Mississippi Supreme Court had accepted interlocutory appeals of denials of immunity-based motions for summary judgment through a certification process similar to 28 U.S.C. § 1292(b). *Id.* As we have discussed, the New Jersey courts have evolved no such common law rule and are quite inhospitable to interlocutory appeals.

We think that this case is more similar to *Marrical v. Detroit News*, 805 F.2d at 169, in which the Sixth Circuit dismissed an appeal in a diversity action from a denial of a motion for summary judgment asserting qualified official immunity. The *Marrical* court noted that Michigan state courts were aware of the distinction drawn between immunity from suit

(Footnote continued)

dismiss for lack of appellate jurisdiction defendants' appeals, based on the defense of qualified immunity under the New Jersey Tort Claims Act, from the district court's refusal to grant them summary judgment on plaintiff's pendent state claims.

II. THE MERITS OF THE SUMMARY JUDGMENT MOTIONS

A. Qualified Official Immunity and Standards for Summary Judgment

In reviewing the district court's rulings on defendants' motions for summary judgment alleging qualified official immunity with respect to plaintiff's *federal* claims, we must apply the doctrine of qualified immunity and the summary judgment standards that have evolved under federal law. An appellate court reviewing the denial of a defendant's claim of qualified immunity must inquire "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell*, 472 U.S. at 528. The *Harlow* Court held that this inquiry is an objective inquiry into whether the challenged official conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Supreme Court further articulated this objective standard, holding that "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Although *Mitchell*, *Harlow*, and *Anderson* clearly define the nature of our analysis in reviewing the district court's

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and immunity from liability and concluded that there was "no reason to believe the Michigan Supreme Court . . . intended to afford state officers immunity from suit as well as from liability." *Id.* at 173.

denial of defendants' claims of qualified immunity, these cases less clearly define the scope of our review. Our inquiry into whether the Evans' asserted constitutional right of access to the civil courts was established with the requisite clarity at the time defendants allegedly violated it, for example, would seem to encompass inquiry into whether the right was recognized at all. The First Circuit has opined in dicta, however, that *Mitchell* so circumscribes the scope of appellate review that a reviewing court may not "'even determine whether the plaintiff's allegations actually state a claim.' " *Bonitz v. Fair*, 804 F.2d 164, 166 (1st Cir. 1986) (quoting *Mitchell*, 472 U.S. at 528), *overruled on other grounds, Unwin v. Campbell*, 863 F.2d 124, 131 (1st Cir. 1988). From this perspective, we would have to confine our inquiry strictly to whether the right that Grabowski and Schwartz allegedly violated was clearly established and could not consider whether Evans' putative right was established in the first place.

We believe, however, that such a reading of *Mitchell* is unduly narrow. The *Mitchell* Court stated only that an appellate court reviewing the denial of a defendant's claim of qualified immunity "need not" consider whether the plaintiff stated a cognizable claim. 472 U.S. at 528. *Mitchell* therefore did not hold that a reviewing court may not address this issue, and properly so, for the inquiry that *Mitchell* mandates into whether the rights that a defendant official is alleged to have violated were clearly established at the time of his challenged actions may have to devolve into an inquiry into whether the legal norms that the defendant is alleged to have violated were recognized at all. *See id.; cf. Chinchello v. Fenton*, 805 F.2d 126, 132 (3d Cir. 1986) (suggesting that, although "the qualified immunity issue may be said to overlap with the legal issue on the merits" when defendant's alleged conduct in no way breaches a rule of liability, immunity issue may nonetheless be sufficiently conceptually distinct to permit review). Indeed, it strikes us as both illogical and contrary to the interests of judicial economy to construe *Mitchell* to require that when a reviewing court determines that a constitutional right allegedly violated could not have been clearly established because it has not been recognized, the court may not directly

so hold. We believe, therefore, that we properly address *infra* the issue whether plaintiff's allegation that Grabowski and Schwartz violated Evans constitutional right to receive assistance in gaining access to the civil courts ultimately is constitutionally cognizable.

An additional issue pertaining to the scope of our review of the district court's decisions denying immunity is whether we may look beyond the allegations of plaintiff's complaint to the pre-trial record in determining whether the district court properly denied defendants' immunity-based motions for summary judgment. The propriety of such a relatively expansive review has been open to doubt. *Compare Turner v. Dammon,* 848 F.2d 440, 444 (4th Cir. 1988) (holding that, in determining whether claim of qualified immunity to section 1983 suit properly was denied, court of appeals should not confine itself to allegations in complaint, but also should inquire "'whether . . . there is a genuine issue, triable to a jury,' of a clearly established constitutional violation") (citation omitted) *with Bonitz v. Fair*, 804 F.2d at 164 (holding that, on appeal of denial of claim of qualified immunity to section 1983 liability, review may encompass only allegations of plaintiff's complaint and not facts adduced as to defendant's conduct); *Chinchello*, 805 F.2d at 130-31 (flagging, but not resolving, issue whether appellate court reviewing denial of claim of immunity may consider whether material dispute of fact exists).

Anderson, however, established a standard of review of denials of qualified immunity that requires analysis not only of the clear establishment of the right that an official is alleged to have violated, but also of the specific official *actions* alleged to have violated the right. *See* 483 U.S. at 640. *Anderson* thus appears to require a court faced with whether a claim of qualified immunity properly was denied to engage in an analysis of the facts adduced concerning the conduct of the official who claims immunity. *See Unwin v. Campbell*, 863 F.2d at 131 (holding that *Anderson*'s " 'fact-specific' " inquiry necessitated overruling previous circuit precedent holding that, on appeal of a denial of qualified immunity, court may look

only to allegations set forth in plaintiff's complaint and not to pretrial record concerning defendant's conduct).

Although we have not previously addressed this issue explicitly, we believe that we implicitly have held that *Anderson* requires appellate inquiry into whether the plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to whether the defendant official engaged in the conduct alleged to have violated a clearly established right. *See Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087, 1092, 1096-97 (3d Cir. 1989) (citing *Anderson* and holding, *inter alia*, that a defendant was entitled to qualified immunity due to insufficient evidence that she engaged in conduct violative of clearly established constitutional right); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989) (citing *Anderson* in holding that "'fact-specific'" inquiry was required into whether defendants were entitled to assert qualified immunity as defense to section 1983 action), *cert. denied* 110 S. Ct. 840 (1990). We conclude that under *Anderson*'s fact specific standard for qualified immunity, as construed and applied by our precedents, we must determine whether the district court properly denied defendants' claims of qualified immunity in part by analyzing the evidence adduced by plaintiff as to the conduct of the defendants.

This evidentiary analysis is governed by the Supreme Court's trilogy of cases[9] defining the quantum of evidence sufficient to enable a nonmoving party to survive a motion for summary judgment. The trilogy's basic rule is that a motion for summary judgment will not succeed "if the dispute about a material fact is 'genuine.' " *Liberty Lobby* 477 U.S. at 248. This standard, which mirrors the standard for directing a verdict, requires an inquiry into "whether the evidence presents

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[9] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 474 U.S. 574 (1986).

a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. Count One: Right of Access to the Civil Courts—Was Summary Judgment Properly Denied?

In count one, plaintiff alleges that Officer Schwartz and Detective Grabowski unlawfully interfered with and ultimately denied Evans her constitutional right of access to the civil courts. We note preliminarily that an individual's constitutional right of access to the courts is well settled. *See Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907) (deriving such right, in context of analyzing state wrongful death statute, from article four privileges and immunities clause and fourteenth amendment); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (fourteenth amendment due process clause assures citizens access to courts to present allegations that fundamental constitutional rights have been violated); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (first amendment rights of association encompass right of access to agencies and courts to be heard on applications for operating rights sought by competitors). A deprivation of the constitutional right of access to the courts clearly is actionable under section 1983. *See, e.g., Abdul-Akbar v. Wilson*, 901 F.2d 329 (3d Cir.) (holding that district court's denial of prisoner's sixth amendment right of meaningful access to the courts was actionable under section 1983), *cert. denied* 111 S. Ct. 239 (1990).

Plaintiff maintains that Grabowski and Schwartz denied Evans her constitutional right of access to the civil courts by failing to inform her adequately of her rights under New Jersey law. Plaintiff grounds this claim in Schwartz's and Grabowski's alleged violations of New Jersey's Domestic Violence Act, which directs police officers to inform a victim of domestic violence of her right to obtain at any time a temporary restraining order against her attacker in civil court. N.J. Stat. Ann. § 2C:25-7. The crux of plaintiff's contention is

that the Act spells out a way in which the right of access to the courts, constitutionally guaranteed and enforceable through 42 U.S.C. § 1983, may be protected. The district court, agreeing with the plaintiff, more fully delineated this position. The court concluded that the Act, from a constitutional perspective, does more for victims of domestic violence than simply to highlight for them the right of access to the courts. The court held, rather, that the Act, coupled with the constitutionally protected right of access to the courts, creates for New Jersey victims of domestic violence an expansive due process right to receive assistance in gaining civil court access.

In denying defendants' motions for summary judgment, the district court looked both to the Domestic Violence Act and to *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), a case in which a court applied equal protection scrutiny to police conduct in the context of domestic abuse. The district court emphasized, in particular, that the events in this case occurred four years after the New Jersey legislature enacted the Domestic Violence Act and three years after the Act became law. On the basis of the Act and the *Thurman* case, the court held that a due process right to receive assistance in gaining court access was, as required by *Mitchell*, *Harlow*, and *Anderson*, both clearly established and definite in its contours at the time that the events in this case transpired. Concluding that the record did not establish "that Schwartz and Grabowski operated independently" and that plaintiff had raised genuine issues of material fact as to whether the two officers had violated Evans' right to receive assistance in gaining access to the civil courts, the court denied summary judgment to defendants on plaintiff's civil court access claim.

Schwartz challenges the district court's denial of his qualified immunity defense to plaintiff's civil court access claim primarily on factual grounds. Schwartz asserts that his contact with Evans was fleeting and merely prefatory to her contact with Grabowski, the officer assigned to her case. Schwartz in substance contends that plaintiff can adduce no evidence to show that he reasonably could have known that the Domestic Violence Act applied to Evans' situation, much less

incurred any obligation to assist her in obtaining access to the family court to obtain a restraining order against McKenzie. Grabowski challenges the denial of his qualified immunity defense to the civil court access claim primarily on legal grounds. Grabowski concedes that he failed to fulfill his obligations under the Domestic Violence Act. He asserts, however, that his failure to fulfill his obligations under the Act did not amount to a denial of Evans' constitutional right of access to the civil courts. The two defendants together ask us to hold that Evans had no constitutional right to receive assistance in gaining access to the courts — in essence, that plaintiff failed to state a cognizable constitutional claim. They also ask us to hold that plaintiff has established no genuine issue of material fact as to whether they acted to violate Evans' existing and circumscribed constitutional right of access to the civil courts.

Turning first to the issue whether Evans possessed a clearly established constitutional right — or any recognized constitutional right at all — to receive assistance in gaining access to the civil courts, it is certain that a violation of New Jersey's Domestic Violence Act, standing alone, is insufficient to give rise to a statutory or constitutional claim under 42 U.S.C. § 1983. The plain language of section 1983, interpreted and underscored by the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), only supports causes of action based upon violations, under the color of state law, of *federal* statutory law or constitutional rights. Section 1983 does not provide a cause of action for violations of state statutes, and, as the district court observed, a state statute cannot, in and of itself, create a constitutional right. *See Philadelphia Police and Fire Association for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 166-68 (3d Cir. 1989). In *Davis v. Scherer*, 468 U.S. 183, 194 (1984), moreover, the Supreme Court held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some [state] statutory or administrative provision." We believe that *Davis*, in tandem with the previous cases, renders the Domestic Violence Act effectively irrelevant to analysis of whether Evans, at the time of her encounter with

Grabowski, had a clearly established *constitutional* right to receive assistance in gaining access to the civil courts. As a matter of law, therefore, plaintiff's intertwined claim of violations of Evans' statutory rights under the Domestic Violence Act and of her constitutional right of access to the courts is cognizable under section 1983 only if this constitutional right is expansive enough to encompass the state statutory rights.

The due process clause of the fourteenth amendment imposes upon state actors an obligation to refrain from preventing individuals from obtaining access to the civil courts. *See Wolff v. McDonnell*, 418 U.S. at 578-79; *Boddie v. Connecticut*, 401 U.S. 371 (1971); *see also Bell v. City of Milwaukee*, 746 F.2d 1205, 1260-61 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983). But only when the state has custody of an individual must its actors, to ensure that the individual receives due process, provide assistance in gaining access to the courts. *See Bounds v. Smith*, 430 U.S. 817 (1977) (fundamental right of access to the courts requires prison authorities to assist inmates in preparation and filing of meaningful legal papers); *cf. Wolff v. McDonnell*, 418 U.S. at 578-80 (fundamental right of access to the courts bars prison authorities from prohibiting inmates from providing assistance to one another in preparing civil rights actions).[10] Evans' constitutional right of access to the civil courts, therefore, does not appear expansive enough to encompass the right to receive

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[10] The constitutional right of access to the courts also comprehends a right to learn facts necessary to seek redress for constitutional violations of individual rights. *Bell v. City of Milwaukee*, 746 F.2d at 1205; *Ryland v. Shapiro*, 708 F.2d at 967. For the indigent, this constitutional right may encompass a right not to have to pay legal fees that could bar them from asserting basic rights. *See Boddie v. Connecticut*, 401 U.S. at 371 (due process clause prohibits state from denying individuals unable to pay required fees their right of access to civil courts to obtain dissolution of marriage).

assistance in gaining court access accorded to her by New Jersey's Domestic Violence Act.

Plaintiff's combined statutory and constitutional claim is, at core, coterminous with her claim that Grabowski and Schwartz violated Evans' due process right to police protection, on which the district court granted summary judgment for the defendants. Each claim ultimately is governed by the Supreme Court's decision in *DeShaney*, which we applied in *Philadelphia Police and Fire Association*, 874 F.2d at 156. *DeShaney* establishes a line, conceptually distinct, although sometimes difficult to draw, between a state's obligation to refrain from depriving its citizens of life, liberty, or property without due process of law, and a state's affirmative obligation to protect its citizens from such deprivations at the hands of private actors. *DeShaney*, 109 S.Ct. at 1002-04, 1008-09. *DeShaney* held that in the absence of an affirmative exercise of state power that "so restrains an individual's liberty that it renders him unable to care for himself," a state has no positive duty to ensure that the individual's life, liberty, or property "do not come to harm through other [than state] means." *Id.* at 1005, 1003.[11] As we stated in *Philadelphia Police and Fire*

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[11] In *DeShaney*, a mother, on behalf of her infant son, brought a section 1983 action alleging that the Winnebago Department of Social Services had deprived the son of his liberty interest in bodily integrity in violation of his substantive due process rights under the fourteenth amendment. *Id.* at 1002. For more than a year, the Department of Social Services had received, from hospital personnel and those who knew the child, information strongly suggesting that his father was abusing him. *Id.* at 1001-02. Due to his father's continual beatings, the child sustained brain damage so severe that he fell into a life-threatening coma and is now profoundly retarded. *Id.* at 1002. The child's mother contended that the Department, because it should have been or actually was aware of the danger to her child, had a constitutional obligation to intervene to protect him from his father. *Id.* The Supreme Court, however, emphasized that the father — not the Department of Social Services — had harmed the child and held that the Department's failure to provide the child with adequate protection did not amount to a deprivation of his due process rights. *Id.* at 1007.

Association, "*DeShaney* begins with the proposition that in general the due process clause only restricts state action; it does not obligate the state to protect its citizens from one another." 874 F.2d at 167.

Plaintiff in substance responds that the Domestic Violence Act, which clearly was applicable to Evans' situation, created a relationship akin to custody between Evans and officers Grabowski and Schwartz, thus constituting an exception to the general rule enunciated in *DeShaney* and obligating the officers to provide Evans with assistance in gaining access to the civil courts. The dissent in *DeShaney* indeed urged that statutory or other action taken by a state to protect a class to which an individual belongs constitutes the most appropriate vantage point from which to begin analyzing whether a state unconstitutionally deprived an individual of due process rights. 109 S. Ct. at 1008-09 (Brennan, J., dissenting). From this perspective, "a State may be found complicit in an injury even if it did not create the situation that caused the harm." *Id.* at 1009. This, however, was not the perspective adopted by the *DeShaney* majority, whose holding we were constrained to follow in *Philadelphia Police and Fire Association* and are constrained to follow now.

The plaintiffs in *Philadelphia Police and Fire Association* contended, similarly to the plaintiff in this case, that the operation of a Pennsylvania statute, which provided that all mentally retarded citizens would receive adequate services, created a special relationship between the state and these citizens, obligating the state to continue its protection of them. 874 F.2d at 166. We noted in *Philadelphia Police* that a protective statute also underlay the plaintiff's claim in *DeShaney*. *Id.* In words equally applicable to this case, we held that the "cessation of action by the state . . . in no way differs from the *DeShaney* situation. Just as in *DeShaney*, the retraction of state intervention permits the harm, but the harm in each case actively is caused by a source other than the state." *Id.* at 167.

Plaintiff's allegation that the Domestic Violence Act and the constitutional right of access to the civil courts together gave Evans a constitutional right to receive assistance in gaining civil court access, therefore, does not constitute a cognizable constitutional claim under section 1983. Plaintiff appears further to contend, however, that even if the Domestic Violence Act and the due process clause did not create for Evans a right to receive assistance in gaining civil court access, Grabowski and Schwartz, through their actions, did create such a right. Plaintiff points to the *DeShaney* Court's holding that a state may incur an affirmative duty to assist or protect an individual, if it imposes limitations "on his freedom to act on his own behalf." 109 S. Ct. at 1006. Plaintiff argues that there are strong factual analogies between this case and cases in which courts have premised a state actor's constitutional liability for the failure to provide adequate assistance or protection upon the state's special relationship to an individual or its role creating a special danger to the individual from a private actor. Plaintiff relies, in particular, upon two recent cases decided by other circuits — *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990), and *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 112 L. Ed. 2d 305 (1990).

In *Cornelius*, two prisoners assigned to a community work squad abducted the plaintiff from the town hall where she worked and held her hostage for a period of three days, during which they repeatedly threatened to sexually assault and kill her. *Id.* at 350. The plaintiff brought a section 1983 action against the town, several of its officials, and members of the state department of corrections, alleging that they had violated her constitutionally protected liberty interests. *Id.* at 349. The plaintiff contended that the town and its officials had a special relationship with her, akin to custody, because her employment as Town Clerk required her to work in the town hall building in which the prisoners also regularly worked. *Id.* at 355. She further contended that each of the defendants, by permitting violent criminals to be assigned to the work squad and then failing to supervise them adequately, contributed to create a special danger to her. *Id.* at 351.

The district court in *Cornelius* found that no special relationship existed between the plaintiff and the defendants that could give rise to a constitutional duty to protect her from the work squad prisoners and granted summary judgment for the defendants. *Id.* at 349. The court of appeals reversed, holding that the plaintiff had presented evidence that established genuine issues of material fact as to whether the defendants had a special relationship with the plaintiff and were aware that the work squad prisoners posed a special danger to her. *Id.* The court, harmonizing its holding with *DeShaney*, emphasized "the degree of control the town officials exercised over [the plaintiff] as Town Clerk" and that the defendants "increased [her] vulnerability to harm by regularly exposing her to the work squad inmate by virtue of her position." *Id.* at 355-56. The court, emphasizing the degree of control that the defendants exercised over the prisoners who harmed the plaintiff, also distinguished *Martinez v. California*, 444 U.S. 277 (1980), in which the Supreme Court held that a parole board was not subject to liability under section 1983 for a murder committed by a parolee five months after his release from prison.

In *Wood*, the defendant, a state trooper, arrested a driver for intoxication, impounded the driver's car, and left the plaintiff passenger stranded alone in a high-crime area in the early hours of the morning. 879 F.2d at 586. As she attempted to make her way home, the plaintiff accepted a ride from a male stranger and was raped. *Id.* Plaintiff, in a section 1983 action against the trooper, alleged that his impoundment of the car in which she was travelling distinguished her from the general public and triggered an established constitutional duty to protect her liberty interests by seeing to her safety. *Id.* at 590. The district court granted summary judgment for the defendant on the ground that he owed the plaintiff no constitutional duty of protection and was entitled to good faith qualified immunity. *Id.* at 586. The court of appeals reversed, holding that the plaintiff had raised triable issues of fact as to whether the defendant affirmatively and with deliberate indifference had placed her in danger and then breached a due process duty of protection. *Id.* at 589-90.

We are, of course, not bound by *Cornelius* and *Wood*. At all events, we believe that the evidence introduced in *Cornelius* and in *Wood* contrasts in important respects with that offered in this case.

In *Cornelius*, the plaintiff introduced evidence that the defendants who employed her exercised a control over her work environment that arguably was sufficient to create a special, quasi-custodial relationship between them. The *Cornelius* plaintiff also supplied evidence that the defendants, prior to the prisoners' escape, had custody of them and were aware or should have been aware that the prisoners posed a special danger to her. In the case at bar, the evidence that plaintiff has adduced with respect to Schwartz is gossamer. Plaintiff's evidence establishes only that Schwartz took Evans' statement and, consistent with Roselle police policy, passed on the information that he obtained to detective Grabowski for further investigation and action. Plaintiff, moreover, has provided no evidence that Grabowski, the officer assigned to Evans' case, in any way constrained either her general liberty or her freedom of her own accord to seek protection from McKenzie in the civil courts. Plaintiff also has failed to supply any evidence that either Schwartz or Grabowski had custody of McKenzie prior to his initial kidnapping and assault of Evans — a factor that might have triggered a constitutional duty on their parts to assist Evans subsequently in obtaining court protection from him. Indeed, McKenzie, like the individual who murdered the plaintiff's decedent in *Martinez*, was a parolee subject only to the limited control of a state parole board.

In *Wood*, the plaintiff introduced evidence that the defendant acted to place her in a perilous situation and then, with deliberate indifference to her danger, abandoned her. Once again, plaintiff in this case has adduced no evidence to show that Schwartz's contact with Evans was more than fleeting and merely prefatory to her contact with Grabowski. Plaintiff, moreover, has shown only that Grabowski failed to advise Evans of her rights under the Domestic Violence Act or otherwise. In contrast to the plaintiff in *Wood*, she has

supplied no evidence that Grabowski, much less Schwartz, acted to create or to exacerbate the danger that McKenzie posed to Evans, thereby triggering a possible constitutional duty to assist her in gaining access to the civil courts.

In sum, Evans' constitutional right to receive assistance in gaining access to the civil courts could not have been established with the clarity required by *Mitchell, Harlow*, and *Anderson*, at the time that Grabowski and Schwartz allegedly violated it, because Evans possessed no such right. The constitutional right of access to the civil courts plainly does not encompass a right to receive assistance in gaining access to the civil courts. Ultimately, then, under the facts at bar, plaintiff's section 1983 civil court access claim is not constitutionally cognizable. Moreover, under *DeShaney* and *Philadelphia Police and Fire Association*, the Domestic Violence Act cannot be construed as creating either a quasi-custodial relationship between defendants and Evans or any concomitant constitutional duty on their part to assist Evans in seeking protection from her assailant in the civil courts. Defendants' failure to inform Evans of her rights under New Jersey's Domestic Violence Act simply does not amount to a violation of Evans' constitutional right of access to the courts. We note that plaintiff has supplied no evidence to show that Schwartz had sufficient knowledge of Evans' prior cohabitation with McKenzie even to trigger his duties under the Domestic Violence Act. Grabowski could and should have instructed Evans as to her rights under the Act. He was not, however, constitutionally compelled to do so.

Finally, from a more factual perspective, plaintiff has adduced insufficient evidence to create a genuine issue of material fact as to her claim that Grabowski, much less Schwartz, acted so as to create a special relationship with Evans, triggering a constitutional duty to assist her in obtaining protection from McKenzie in the civil courts. Plaintiff has provided no evidence to show, as *DeShaney* would appear to require, that either defendant affirmatively barred the door to the civil courts to Evans, that he otherwise limited her freedom

to act on her own behalf, or that he created or exacerbated the danger that McKenzie posed to her.

Given Grabowski's position of responsibility, the role of inert spectator to an unfolding tragedy that he chose to play is extremely disturbing. We believe, however, that the cases establishing and defining the constitutional right of access to the courts, the Supreme Court's holding in *DeShaney*, and our decision in *Philadelphia Police and Fire Association*, coupled with the evidence that plaintiff has adduced, cannot be interpreted so as to uphold the district court's decision denying either defendant's motion for summary judgment on plaintiff's civil court access claim. We therefore will reverse the district court's denial of summary judgment to Grabowski and Schwartz on this claim.

C. Count Three—The Equal Protection Claim

In count three, plaintiff claims that Grabowski and Schwartz, by failing to comply with New Jersey's Domestic Violence Act, breached their constitutional duty to enforce the state's laws equally and fairly, in violation of Evans' fourteenth amendment right to equal protection. She further alleges that defendants' failure to provide Evans with adequate protection resulted from a discriminatory animus toward victims of domestic violence, who primarily are women.

In developing her equal protection claim, plaintiff relies, as did the district court, on our decision in *Hynson v. City of Chester Legal Department*, 864 F.2d 1026 (3d Cir. 1988). In *Hynson*, we took note of the "growing trend of reliance on 42 U.S.C. § 1983 to bring an action against the police alleging that the policies used in handling domestic abuse cases violate the equal protection of women victims." *Id.* at 1027. We then announced a new precedent setting forth the requirements for stating an equal protection claim grounded in the unequal treatment of victims of domestic violence. We held that

> [i]n order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a

> reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.

Id. at 1031 (footnote and citations omitted).

After setting forth the "prima facie" requirements for stating a constitutional claim of gender-based discrimination in police policies toward victims of domestic violence, we further determined, in *Hynson*, what a plaintiff must establish to overcome an official's assertion of qualified immunity. We held that, under *Harlow* and *Anderson*, the right to equal protection of a woman subjected to domestic violence must be both established and clear in its contours before an individual police officer loses qualified immunity from suit for its violation. *Id.* at 1032. We concluded that

> . . . a police officer loses a qualified immunity to a claim that a facially neutral policy is executed in a discriminatory manner only if a reasonable police officer would know that the policy has a discriminatory impact on women, that bias against women was a motivating factor behind the adoption of the policy, and, that there is no important public interest served by the adoption of the policy.

Id.

The district court denied defendants' motions for summary judgment, based on qualified immunity, on plaintiff's equal protection claim, opining that defendants' contention that they violated no clearly established equal protection right in their dealings with Evans "strains credulity." We might well agree,

at least with respect to Grabowski, had the events that led to this action occurred at a later point in time.[12]

In *Hynson*, however, we announced that we had, "perhaps for the first time in a published opinion," articulated a standard for the district courts in this circuit to follow in section 1983 cases arising from domestic violence. *Hynson*'s self-conscious announcement of a new equal protection rule for this circuit occurred in December of 1988 — nearly three years after the events giving rise to this action took place. Our research indicates that prior to January of 1985, when Evans sought the assistance and protection of the Roselle police, only one decided case, from another jurisdiction, dealt with equal protection rights in the context of an allegedly discriminatory implementation of a police policy concerning domestic violence.[13]

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[12] Plaintiff points to Grabowski's reluctance to file sexual assault and kidnapping charges against McKenzie once he learned that McKenzie and Evans had at one time lived together in an intimate fashion. Plaintiff further relies upon Grabowski's dismal record regarding domestic assaults. Grabowski himself admitted that he had not filed a single domestic violence complaint or report from the time the New Jersey Domestic Violence Act was enacted in 1982 until Evans' murder in 1985. Plaintiff supplied evidence that Grabowski, in addition, made a practice of not informing victims, such as Evans, of their rights and options under the Act.

Plaintiff's evidence against Schwartz is much more slender. Plaintiff established that Schwartz, like Grabowski, failed to inform Evans of her rights and options under the Domestic Violence Act. She also showed that Schwartz had failed to file a domestic violence report in Evans' case. Schwartz asserted, however, that in Evans' case he served only as a conduit to Grabowski and that it was his regular practice both to provide victims of domestic violence with information concerning their rights and to file domestic violence reports. Plaintiff supplied no evidence to refute this assertion.

[13] In denying summary judgment to defendants, the district court relied upon this case, *Thurman v. City of Torrington*, 595 F. Supp. at 1521, which held that the plaintiff, who claimed that she was injured because the

(Footnote continued)

Our research also suggests that scholarship on the right to equal protection of victims of domestic abuse mainly postdates the period in which the events in this case took place. *See* Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263 (1987) (providing some discussion of equal protection rights in the context of law enforcement and domestic violence); Zimring, *Legal Perspectives on Family Violence*, 75 Calif. L. Rev. 521 (1987) (same); Case Comment, *Gender-Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints:* Thurman v. City of Torrington, 75 Geo. L.J. 667 (1986); Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L.J. 788 (1986); *but see* L. Armstrong, *The Home Front: Notes From the Family War Zone* (1983) (urging that victims of domestic violence should be accorded basic security afforded by the law and the equal protection clause); Marcus, *Conjugal Violence: The Law of Force and the Force of law*, 59 Calif. L. Rev. 1657 (1981) (nonenforcement of assault laws against victims of domestic violence violates the equal protection clause of the fourteenth amendment).

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police applied an administrative classification so as to discriminate against women complaining of domestic abuse, stated a cognizable claim under section 1983 for the violation of her right to equal protection. *Id.* at 1526-29.

With the exception of *Thurman*, the cases cited in *Hynson*, by plaintiff, and by the district court as delineating the evolving right to equal protection of victims of domestic abuse, all were decided well after January of 1985. *See Hynson*, 864 F.2d at 1027 n.1 (citing *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Dudosh v. City of Allentown*, 665 F. Supp. 381 (E.D. Pa. 1987), *reh'g denied sub nom Dudosh v. Warg*, 688 F. Supp. 944 (E.D. Pa. 1987), *vacated in part*, 853 F.2d 917 (3d Cir 1988); *Sherrell ex. rel. Wooden v. City of Longview*, 683 F. Supp. 1108 (E.D. Tex. 1987)).

Our survey of these cases and materials strongly suggests that, in 1985, the equal protection rights of domestic violence victims were far less recognized and defined than they are today. We believe that *Thurman, see supra* note 13, a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim, such as Evans, to enable reasonable officials to "'anticipate [that] their conduct [might] give rise to liability for damages.'" *Anderson*, 483 U.S. at 646 (quoting *Davis*, 468 U.S. at 195). *Anderson*'s strict elaboration of *Harlow*, establishing that an official is entitled to summary judgment on grounds of qualified immunity, unless the right that the official is alleged to have violated is both clearly established and clear in its contours, may produce distressing results in cases such as this one.[14] We believe, however, that *Harlow, Anderson*, and our recent decision in *Hynson* compel the holding that Grabowski and Schwartz are entitled to qualified immunity with respect to plaintiff's equal protection claim. We therefore will reverse the district court's decision denying summary judgment to defendants on this claim.

D. Individual Liability of Police Chief Trolan

In the fourth count of her complaint, plaintiff claims that the Roselle Police Department, the Borough of Roselle, and Chief Trolan, in both his individual and official capacities, violated Evans' right to equal protection, her right of access to the courts, and various other of her due process rights. Plaintiff claims, *inter alia*, that Trolan individually is liable for

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[14] *Anderson's* rule has, for this reason, received criticism. *See* Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 49 (1989) (criticizing *Anderson*'s holding for its "adoption of a standard that looks to whether . . . conduct had been previously clearly proscribed in a setting where the constitutional standard itself is defined by notions of reasonableness" and, therefore, for unduly circumscribing constitutional rights).

these violations of Evans' rights, because he failed to train and supervise his officers adequately. We concluded *supra* that although we lack jurisdiction over the appeals of the Department, the Borough, and Chief Trolan in his *official* capacity, we clearly have jurisdiction over Trolan's appeal, in his *individual* capacity, from the district court's denial of his claim that he is entitled to summary judgment on count four on grounds of qualified immunity.

The district court denied summary judgment to all of the defendants named in count four. In arriving at this decision with respect to Trolan in his individual capacity, the district court relied exclusively on precedents governing *municipal* liability.[15] The court did not consider precedents, such as *Rizzo v. Goode*, 432 U.S. 361 (1976), or our decision in *Chinchello v. Fenton*, 805 F.2d 126 (3d Cir. 1986), which, at the time that the events giving rise to this case transpired, governed an official's liability, in his *individual* capacity, for violations of constitutional rights arising from the official's putative failure to train and supervise subordinates adequately. Indeed, the district court, in contending with the numerous issues that count four raises concerning municipal liability, did not specifically address whether Trolan, sued in his individual capacity, possesses qualified immunity from suit for the violations of Evans' constitutional rights allegedly arising from his failure to train and supervise his officers properly.

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[15] The district court, for example, analyzed whether plaintiff, as required by *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99 (1986), had predicated the alleged derivative liability of the *municipal* defendants upon actual violations of constitutional rights by individual officers. The district court also emphasized the municipal plan or policy nexus necessary to trigger liability under section 1983, which the Supreme Court established in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The district court looked, in addition, to *City of Canton v. Harris*, 109 S. Ct. 1197 (1989), in which the Supreme Court held that a *municipality's* failure to train police officers may give rise to section 1983 liability when that failure demonstrates deliberate indifference to the constitutional rights of those with whom the police come in contact. *Id.*

We believe that, at the time the events giving rise to this case occurred, the case law governing an individual's right to have a supervisory official take steps to ensure that subordinate police officers would not violate the individual's constitutional rights compels the conclusion that Trolan, in his individual capacity, possesses qualified immunity to plaintiff's claim in count four. *Rizzo*, as well as several of our precedents prevailing at the time, condition the liability of a supervisory official for constitutional violations perpetrated by subordinate police officers upon the official's direct and active involvement in the violations. The *Rizzo* Court overturned a district court order compelling individual city officials to afford sweeping equitable relief to the plaintiffs, because the defendant officials, in contrast to subordinate police officers, had not been found "by their *own* conduct" to have violated the plaintiffs' constitutional rights. 432 U.S. at 377 (emphasis in original). We subsequently held that, under *Rizzo*, city officials could not be held liable or compelled to afford equitable relief for violations of constitutional rights committed by subordinate police officials, unless they had "played an affirmative role in the deprivation of [those] rights." *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306, 336 (3d Cir. 1981), *cert. denied* 458 U.S. 1121 (1982); *accord Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) (Under *Rizzo*, police chief may only be held liable for subordinate officer's unconstitutional activity if he participated in pattern of violation), *cert. denied* 455 U.S. 1008 (1982); *Lewis v. Hyland*, 554 F.2d 93, 98 (3d Cir.) (injunctive relief against state police officials properly denied absent showing of participation or direct involvement in violations of constitutional rights perpetrated by subordinate officers), *cert. denied* 434 U.S. 931 (1977). These governing precedents stand for the proposition that, in the context of police action, an official's mere — and even callous — inaction in the face of subordinate officers' unconstitutional actions clearly does not suffice to render the official liable for those actions. *Rizzo*, 423 U.S. at 376; *Black*, 662 F.2d at 189; *Porter*, 659 F.2d at 336-37; *Lewis*, 554 F.2d at 98-99.

In *Chinchello*, a precedent that also governed at the time that the events giving rise to this case occurred, we applied

Rizzo and our decisions concerning an official's constitutional liability for the failure to train and supervise subordinates in the context of an appeal, akin to Trolan's, from the denial of a claim of qualified immunity to a *Bivens* action alleging that the defendant official had violated the plaintiff's rights through his failures to train and supervise. 805 F.2d at 126. We concluded that *Rizzo* and our decisions stood for the proposition that "a supervising public official has [no] affirmative constitutional duty to supervise and discipline so as to prevent violations of constitutional rights by his or her subordinates." *Id.* at 133. We therefore held that the official's failure to train, supervise, and discipline subordinates could not, absent a showing of the official's direct involvement in the subordinates' unconstitutional actions, amount to the violation of a clearly established constitutional duty and that he was entitled to qualified immunity. *Id.* at 134.[16]

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16 As the district court noted, *see supra* note 15, the Supreme Court, in *City of Canton v. Harris*, 109 S. Ct. at 1204, held that a municipality's failure to train police officers adequately may give rise to liability under section 1983 "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." In *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725 (3d Cir. 1989), we held that, under *City of Canton*, a school official may be held liable in an individual, as well as an official, capacity when the official, with deliberate indifference to the consequences, establishes or maintains a policy, practice, or custom that directly causes a deprivation of the constitutional rights of a student. *See also Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) (holding, in context of section 1983 action against prison officials for unconstitutional detention, that "the standard of individual liability for supervisory public officials" could be no less stringent than the "deliberate indifference" standard for municipal liability established in *City of Canton*). This case, however, is distinguishable from *Stoneking* in which we held that various school officials, sued in their individual, as well as official, capacities, were not entitled to summary judgment on plaintiff's claim that, from 1979 through 1985, they established or maintained a policy, practice, or custom of ignoring student complaints of sexual molestation by a teacher, with deliberate indifference to the consequences. *See* 882 F.2d at 722-25.

Plaintiff has presented considerable evidence that Chief Trolan presided over a detective bureau that was carelessly apathetic at best and grievously incompetent at worst. As we have detailed, the Union County prosecutor's office found that the Roselle Police Department's Detective Bureau completely lacked supervision, accomplished little work, filed few reports on the numerous cases assigned to it, and did nothing to follow up on crimes involving domestic violence. Plaintiff has supplied no evidence, however, that Chief Trolan directed or affirmatively participated any of the actions claimed to have deprived Evans of her constitutional rights and, ultimately, her life. Under *Rizzo, Chinchello*, and the other decisions that we have discussed, Trolan's failure to train and supervise his subordinates, regardless of how inept and careless that failure may have been, cannot be held, consistent with *Mitchell, Harlow*, and *Anderson*, possibly to have violated a constitutional right on Evans' part that was clearly established and clear in its contours. We therefore will reverse the district court's decision denying summary judgement to Trolan in his individual capacity on plaintiff's claim that, due to his failure to train and supervise his officers adequately, he violated Evans constitutional rights.

IV. CONCLUSION

In sum, we hold that defendants Grabowski and Schwartz are entitled to summary judgment on plaintiff's claims that they denied Evans her constitutionally protected right of access to the civil courts and her right to equal protection. We also hold that defendant Trolan is entitled to summary judgment, in his individual capacity, on plaintiff's claim that, through failing to train and supervise his officers adequately, he violated Evans right to equal protection, her right of access to the courts, and other of her due process rights. We therefore will reverse the district court's denials of summary judgment to these defendants on these claims and remand the case to the district court with the direction to grant summary judgment thereon.

Due to the absence of finality, we conclude that we have no jurisdiction over plaintiff's appeal of the district court's decisions dismissing her criminal court access claim and

granting summary judgment to defendants Grabowski and Schwartz on plaintiff's claim that they violated Evans' right to due process by failing to afford her adequate protection. We conclude that, in the absence of finality, we also have no jurisdiction over the appeals by Chief Trolan, in his official capacity, the Roselle Police Department, and the Borough of Roselle from the district court's denial of summary judgment on plaintiff's claim that these defendants violated Evans' constitutional rights. In light of our holding that the New Jersey Tort Claims Act does not confer immunity from suit upon the defendants, we further conclude that we lack jurisdiction over the appeals by Grabowski, Schwartz, Trolan, the Roselle Police Department, and the Borough of Roselle from the district court's decision denying their motions for summary judgment on plaintiff's pendent state tort claims. These appeals therefore will be dismissed and the remaining claims in this the case remanded for further proceedings.[17]

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[17] Because we have concluded that Grabowski, Schwartz, and Chief Trolan, sued in his individual capacity, are entitled to summary judgment, on remand these individuals will be pendent parties to the state tort claims comprising part of plaintiff's ongoing action. The district court therefore will have to determine whether it has pendent party jurisdiction over these defendants.

We note that Congress recently resolved this problem for the future by enacting legislation that prospectively provides the federal courts, in actions over which they have original jurisdiction, with supplemental jurisdiction over claims arising from the same case or controversy and that "involve the joinder or intervention of additional parties." S. 2648, 101st Cong., 2d Sess., 135 Cong. Rec. 17901, 17911-12 (daily ed. Oct. 27, 1990). Because this legislation is prospective in nature, however, the district court will have to look to prior case law to determine whether it has pendent party jurisdiction over Grabowski, Schwartz, and Trolan, in his individual capacity, with respect to plaintiff's state claims. *See Finley v. United States*, 109 S. Ct. 2003 (1989) (rejecting pendent party jurisdiction under the Federal Tort Claims Act); *Aldinger v. Howard*, 427 U.S. 1 (1976) (rejecting pendent party jurisdiction over county in section 1983 action); *see also Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 363, 372 n.12 (1978) (*Monell v. New York City Dept. of Social*

(Footnote continued)

TO THE CLERK

Kindly file the foregoing opinion.

/s/ Edward R. Becker
Circuit Judge

DATED:

Services, 436 U.S. 658 (1978), may have called into question the Court's decision in *Aldinger* as to pendent party jurisdiction over counties, but "in no way qualifies the holding of *Aldinger* that jurisdictional questions [concerning pendent party jurisdiction] are statutory as well as constitutional"). For our precedents concerning pendent party jurisdiction, see generally *Abromovage v. United Mine Workers of America*, 726 F.2d 972, 989-92 (3d Cir. 1984) (established three-tiered analysis for whether exercise of pendent jurisdiction is appropriate); *Kuehner v. Schweiker*, 717 F.2d 813, 828 n.17 (3d Cir. 1983) (Becker, J., concurring) (opining that pendent party jurisdiction provided basis for jurisdiction over pendent state defendants in action based upon Social Security Act and federal mandamus statute).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5487, 89-5532

REGINA BROWN, ADMINISTRATRIX and
Administratrix Ad Prosequendum of the
Estate of DEBBIE EVANS

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE

Felix Grabowski, William Schwartz, Vincent F. Trolan, and the Borough of Roselle, *Appellants in 89-5487*

Regina Brown, *Appellant in 89-5532*

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 86-4895)

Argued: January 16, 1990

Before: BECKER, GREENBERG and NYGAARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel January 16, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered May 31, 1989, be, and the same is hereby reversed insofar as the denial of summary judgment as to the defendants Felix Grabowski and William Schwartz on plaintiff's claims that they denied Debbie Evans her constitutionally protected right of access to the civil courts and her right to equal protection; reversed insofar as summary judgment was denied to the defendant Vincent F. Trolan in his individual capacity on plaintiff's claims that, through failing to train and supervise his officers adequately, he violated Evans' right to equal protection, her right of access to the courts, and other of her due process rights; and, the cause is remanded to the said District Court with direction to grant summary judgment to these defendants on these claims.

It is further ordered that the plaintiff's appeal is dismissed for lack of jurisdiction insofar as it seeks review of the dismissal of her criminal court access claim and the grant of summary judgment to the defendants Grabowski and and Schwartz on her claim that they violated Evan's right to due process by failing to afford her adequate protection. It is further ordered that the appeal of Chief Trolan in his official capacity, the Roselle Police Department, and the Borough of Roselle from the denial of summary judgment on plaintiff's claim that these defendants violated constitutional rights is dismissed for lack of jurisdiction. The appeal of the defendants Grabowski, Schwartz, Trolan, the Roselle Police Department, and the Borough of Roselle from the denial of their motions for summary judgment on plaintiff's pendant tort claims is also dismissed for lack of jurisdiction.

It is further ordered that the remaining claims in the case are remanded to the said District Court for further proceedings. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson

Chief Deputy Clerk

December 31, 1990

Certified as a true copy and issued in lieu of a formal mandate on February 6, 1991.

Test : /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5487, 89-5532

REGINA BROWN, ADMINISTRATRIX and
Administratrix Ad Prosequendum of the
Estate of DEBBIE EVANS

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE

Felix Grabowski, William Schwartz, Vincent F. Trolan, and the Borough of Roselle, *Appellants in 89-5487*

Regina Brown, *Appellant in 89-5532*

(D.N.J. Civ. No. 86-4895)

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges*.

The petition for rehearing filed by Appellant Regina Brown, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: JAN 29 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5487, 89-5532

REGINA BROWN, ADMINISTRATRIX and
Administratrix Ad Prosequendum of the
Estate of DEBBIE EVANS

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE

Felix Grabowski, William Schwartz, Vincent F. Trolan, and the Borough of Roselle, *Appellants in 89-5487*

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PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges*.

The petition for rehearing filed by Appellants Felix Grabowski, William Schwartz, Vincent F. Trolan, Roselle Police Department and Borough of Roselle, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: JAN 29 1991

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REGINA BROWN, Administratrix and Administratrix-ad-Prosequendum of the Estate of DEBBIE EVANS,

Plaintiffs,

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ASSISTANT PROSECUTOR WILLIAM DANIEL, individually and as an assistant prosecutor of the Union County Prosecutor's Office, New Jersey; PROSECUTOR JOHN STAMLER, individually and as Prosecutor of the Union County Prosecutor's Office, New Jersey; ROSELLE POLICE DEPARTMENT; THE UNION COUNTY PROSECUTOR'S OFFICE; THE BOROUGH OF ROSELLE and THE COUNTY OF UNION,

Defendants.

Civil Action
No. 86-4895

OPINION

APPEARANCES:

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Department and Borough of Roselle)

BISSELL, *District Judge*

This matter arises before the Court on the basis of a motion for summary judgment by the remaining defendants on all five counts of the complaint filed by Regina Brown, administratrix and administratrix ad prosequendum of the decedent, Debbie Evans.

I. FACTS AND BACKGROUND

The events which led to the filing of this cause of action are set forth at length in this Court's opinion of September 29, 1987. In brief, the plaintiff alleges that between January 9 and 12, 1985, the decedent and others provided the Roselle police with sufficient evidence of violent acts by her cohabitant of about one year (Clifton McKenzie who was at that time compulsorily committed to custody in Integrity House, in Newark, New Jersey, for rehabilitation from drug addiction), to afford them notice of her need for special protection and to trigger their duty to inform her of her rights to file a domestic

violence complaint against him pursuant to the New Jersey Domestic Violence Act, N.J.S.A. 2C:25-1 *et seq.* (the Act). Plaintiff alleges that the defendants' failure to protect Evans resulted in her death at McKenzie's hands on or about January 14, 1985.

In the orders accompanying the two opinions of September 29, 1987, the Court ordered as follows:

1. All causes of action brought against four of the original defendants, the Union County Prosecutor's Office, Union County, Union County Prosecutor John Stamler, and Assistant Union County Prosecutor William Daniel, were dismissed;

2. The motion by Detective Felix Grabowski and Patrolman William Schwartz for dismissal of all four counts of the complaint (as it was then formulated) was denied;

3. The motion by Roselle Police Chief Vincent Trolan, the Borough of Roselle and the Roselle Police Department (Roselle defendants) for dismissal of plaintiff's fourth cause of action (state common law negligence, now set forth in Count V) was denied;

4. The motion by the three Roselle defendants for dismissal of the first three causes of action was granted without prejudice, and the Court gave plaintiff 20 days within which to file an amended complaint. Because an amended complaint was timely filed, plaintiff's first three causes of action against the Roselle defendants, now set forth in Count IV, were reinstated.

Accordingly, for purposes of the present motion, there remain five defendants and five causes of action which allege the following violations of the rights of decedent Debbie Evans:

Count I: When the defendant police officers failed to inform Evans of her right to file a domestic violence complaint pursuant to N.J.S.A. 2C:25-1 *et seq.* or to arrest her cohabitant Clifton McKenzie pursuant to N.J.S.A. 2C:25-5, they denied the decedent's constitutional right of access to the courts (pursuant to 42 U.S.C. § 1983), the privileges and immunities clause of article IV of the Constitution, and the fourteenth amendment. (Amended Compl., ¶¶ 39, 53, 56, 63).

Count II: After Officers Grabowski and Schwartz had created a "special relationship" with Evans, they breached their affirmative duty to provide her with protection, either by arresting McKenzie or otherwise, and so violated her constitutional rights (pursuant to the Act). (Amended Compl., ¶¶ 69-73).

Count III: When the officers provided the decedent with "lesser protection" because she was a victim of domestic violence and failed to provide her with access to civil court they violated the Act and denied the decedent's constitutional right to equal protection of the laws. (Amended Compl., ¶¶ 79-81).

Count IV: The three Roselle defendants deprived the decedent Evans of her constitutional rights of access to the courts, of police protection and of equal protection of the law, by a policy, custom or practice of failure properly to "train, supervise and educate" the two defendant police officers to provide citizens with the protection of the Act and to apprehend those who commit crimes. (Amended Compl., ¶¶ 87-92). (*See* alleged examples of offending policy by the Roselle defendants, *id.* at ¶¶ 93-109).

Count V (common law count): The failure of all the defendants to protect the decedent from the danger of imminent harm (after being made aware that she was an identifiable victim), constituted a "negligent, gross, callous and wanton

disregard for her safety and was the proximate cause of her death." (Amended Compl., ¶ 121).

Now the defendants have brought a motion for summary judgment on all five counts of the amended complaint.

II. DISCUSSION

A. The Summary Judgment Motion

The Court notes that its adjudication of a previous motion by defendants was conducted under a standard more easily met by plaintiff (*i.e.*, failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6)). That earlier adjudication in no way prejudices the Court's analysis of the defendants' present motion. *See, e.g., Wuetrich v. Delia*, 134 N.J. Super. 400 (Law Div. 1975), and *Wuethrich v. Delia*, 155 N.J. Super. 324 (App. Div. 1978).

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 476 U.S. 944 (1986). The Supreme Court recently stated that in applying the criteria for granting summary judgment,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other

> but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict....

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

To prevail on their motion for summary judgment in the present case, defendant police officers Grabowski and Schwartz must show that as a matter of constitutional law and New Jersey state law (l) they had no duty to provide the decedent with special protection or access to the courts, and (2) they did not provide her with lesser protection because she was a victim of domestic violence. The Roselle defendants must show that even if plaintiff's allegations of failure to train and supervise their employees are taken as true, they cannot be held liable under § 1983 because these failures do not constitute a policy that caused Evans' injuries.

B. Plaintiff's Causes of Action

1. The Statutory Framework of a Violation of Constitutional Rights Pursuant to 42 U.S.C. § 1983

The civil rights statute (42 U.S.C. § 1983) governs deprivations of constitutional rights, but it does not create substantive rights. The statute simply provides a recovery mechanism for those who have been deprived of such rights. In this case plaintiff alleges that her decedent was deprived of several of her rights. However, because only a deprivation of those rights that are guaranteed by the Constitution forms the

substance of a cognizable § 1983 claim, plaintiff's allegations must be of constitutional dimension to merit recovery under the federal statute. *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979). When plaintiff states a cognizable claim which is not "constitutionalized by the fourteenth amendment," he must bring it under state law. *Daniels v. Williams*, 474 U.S. 327, 335 (1986).

2. Denial of Right of Access to the Courts (Count One)

a. The New Jersey Domestic Violence Act

In an opinion dated September 29, 1987, this Court ruled that refusal by the four defendant-movants (Union County Prosecutor's Office, Union County, Prosecutor Stamler and Assistant Prosecutor Daniel) to allow the decedent to file a criminal complaint did not offend her constitutional rights (Op. at 6-8) because "[i]n American jurisprudence ..., a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The Supreme Court held that a private citizen may not institute a criminal complaint as a matter of constitutional right. (*Id.* at 619). Accordingly, as a matter of law, this Court held that plaintiff's claim that decedent Evans was denied access to the courts by failure of the Union County defendants to file or to allow her to file a complaint against Clifton McKenzie was not constitutionally cognizable and must be dismissed.

Plaintiff also alleges, however, that decedent was denied access to the courts by the defendant police officers' failure to inform her of her right to file a civil complaint under the New Jersey Domestic Violence Act, N.J.S.A. 2C:25-1 *et seq.* Defendants counter that while they had a duty not to interfere with decedent's access to the courts, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907), they had no affirmative duty

to help her gain access. The Court disagrees. The policy and wording of the Act create a constitutionally enforceable right for victims of domestic violence in New Jersey. The Act was enacted for the express purpose of enabling these victims to get to court quickly for protection.

> ... It is therefore the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.... The legislature finds that battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's inability to generate a prompt response in an emergency situation.
>
> ... It is the intent of the Legislature to stress that *the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim.*

(N.J.S.A. 2C:25-2 (in part)) (emphasis added).

The Act implements this policy partly by authorizing a framework for filing domestic violence complaints, pursuant to N.J.S.A. 2C:25-12(a), outside the regular criminal complaint procedure. The policy is further implemented by imposing on police officers a duty to inform victims of domestic violence (such as plaintiff's decedent here) of their right of access to the Juvenile and Domestic Relations Court.[1] The Act states in relevant part:

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[1] Now called the Family Part of the Chancery Division of the Superior Court.

> A law enforcement officer *shall* disseminate to the victim the following notice, ... "You have the right to go to the juvenile and domestic relations court and file a complaint requesting relief including but not limited to the following: an order restraining your attacker from abusing you or directing your attacker to leave your household. You may request that the clerk of the court assist you in applying for this order....
>
> On weekends, holidays and other times when the courts are closed, you may go to the municipal court for an emergency order granting the relief set forth above."

(N.J.S.A. 2C:25-7) (emphasis added).

In the present case, it is undisputed that Debbie Evans qualified for the Act's protection because she was 18 years of age or older (born October 21, 1958; *see* Defendants' Br., Exh. A), and had shared living quarters with the person of the opposite sex against whom she desired to file a complaint. N.J.S.A. 2C:25-3(a). Further, the decedent alleged to the police defendants that her assailant had committed against her assault, sexual assault and kidnapping, all crimes within the statutory definition of domestic violence. N.J.S.A. 2C:25-3(b). Thus she was a victim for purposes of the Act. N.J.S.A. 2C:25-3(e).

Therefore, even though a state statute like the Act cannot, by itself, create a substantive constitutional right, *see Maine v. Thiboutot,* 448 U.S. 1, 6-11 (1980), the decedent had a constitutionally protected right under those cases establishing a right of access to the civil courts. *See Chambers,* 207 U.S. at 148) (held: right of access partially based on first amendment right to petition for a redress of grievances); *see also Rounds v. Smith,* 430 U.S. 817, 821 (1977) (held: interference with

this right of access gives rise to a claim under 42 U.S.C. § 1983). *See also* other cases cited in this Court's opinion of September 29, 1987 at 7.

Defendants contend that they were unaware that Evans had been victimized by domestic violence. However, these defendants had clear knowledge that she had been living with her attacker for a year, as a result of interviewing her at the police station on January 12, 1987, about two days before she was finally kidnapped and murdered.[2] (Defendants' Br., Exh. B at 4). Defendants' further reliance on the fact that they did nothing to *prevent* Evans from going to court is misplaced. The New Jersey statute creates an affirmative duty in police officers to assist domestic violence victims to get to court. Failure to meet that duty remains "an appropriate basis for plaintiff's claim of deprivation of a constitutionally protected right ...." (Op. of Sept. 29, 1987 at 10).

b. Defense of Qualified Immunity

Qualified immunity is a matter of law to be resolved by the court before the case goes to a jury. *Skevofilax v. Quigley*, 586 F. Supp. 532, 538 (D.N.J. 1984); *Czulanis v. Albanese*, 721 F.2d 98, 108 (3d Cir. 1983).

Finally, as to plaintiff's claim of denial of court access: defendants' reliance on *Harlow v. Fitzgerald*, 457 U.S. 800

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[2] Defendants attempt to disassociate the conduct of Officer Schwartz from the conduct of Detective Grabowski and ask that the charges against Schwartz be dismissed. (Defendants' Reply Br., at 23-24). However, the record does not establish that Schwartz and Grabowski operated independently. Therefore, the Court will continue to address the motion presented here in terms of the activities and omissions of the two men together.

(1982) to support their claims of qualified immunity is unavailing, at least in a summary proceeding. In *Harlow*, the Supreme Court stated that qualified immunity was available to public employees if their actions were reasonable in light of the clearly established law and information in their possession at the time of their actions. (*Id.* at 818). *See also Owen v. City of Independence*, 443 U.S. 622, 638 (1980). "On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818. Although the *Harlow* Court applied the "established law" standard to federal officials, it found no reason to apply a different standard to state officials. (*Id.* at n.30).

The Court is sensitive to the need to avoid "destroy[ing] he balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties' by making it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, __U.S.__, 107 S. Ct. 3034 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). In *Anderson*, the Supreme Court embellished the *Harlow* standard by adding that the "right the official is alleged to have violated" is not "clearly established" unless "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." __U.S.__, 107 S. Ct. at 3039.

For example, if the law affirming the duty of public employees (like the police officers here) to assist victims of domestic violence to gain protection in the civil courts had been new and untested at the time of the police defendants' alleged failure to act, the defense of qualified immunity might be available to them. However, the events that produced this action occurred in January 1985, three to four years after the Act was enacted by the New Jersey Legislature in 1981 and became effective in 1982. (*See* N.J.S.A. 2C:25-1 *et seq.*)

Moreover, the police defendants here knew of the danger of Evans' situation. (Grabowski Dep. (virtually in its entirety); Plaintiff's Br., Exh. D). That knowledge (coupled with the general publicity about the plight of victims of domestic abuse) would bar the defense of qualified immunity for these defendants, even in the absence of case law concerning public employee's affirmative duty to provide access to domestic relations courts. Finally, however, even the *Anderson* standard is satisfied because in *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), a federal court applied equal protection scrutiny to the conduct of local police in a similar domestic abuse situation. Accordingly, the Court finds that in this summary judgment motion defendants should not be awarded judgment on this count on the defense of qualified immunity.

The Court takes no position on the merits of plaintiff's first cause of action for deprivation of Evans' constitutional right of access to the civil courts. However, plaintiff has stated and supported a cognizable claim under 42 U.S.C. § 1983 and the fourteenth amendment, and defendants have been unable to show that, as a matter of law, they are entitled to judgment on this count. Therefore, the two police officer defendants' motion intended to require the state to protect people from each other, except under circumstances where the state had deprived an individual of liberty and thus placed him at a disadvantage in protecting himself. (*Id.* at 1003). *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (held: under the eighth amendment, the state is required to provide adequate medical care to a prisoner in its system); *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (held: the state is required under the fourteenth amendment to provide such services as will reasonably insure the safety of unvoluntarily committed mental patients).

Thus, a state's failure to protect against private violence of which it is aware does not generally constitute a violation of an individual's due process rights. *DeShaney*, __ U.S.__, 109 S.

Ct. at 1003. Further "[i]f the Due Process Clause does not require the state to provide its citizens with particular protective services, it follows that the state cannot be held liable under the clause for injuries that could have been averted had it chosen to provide them." (*Id.*)

Thus, it is clear that *DeShaney* has preempted the tests (previously employed by this Court in its opinion of September 29, 1987 at 11-12 and found applicable to Evans as a victim of domestic violence) imposed in *Jensen v. Conrad*, 747 F.2d 185,194 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), to determine whether a special relationship obtained between the state and a victim of injury.[3] Further, this Court determines that the *DeShaney* Court foreclosed the possibility of liability for a state officer in a case like the one at bar. Only "[w]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, ... and at the same time fails to provide for his basic human needs — e.g. food, clothing, shelter, medical care, and reasonable safety, it transgresses the substantive limits on state action set by ... the Due Process Clause." (*Id.* at 1005-06). Plaintiff's attempts to portray the police officers' failure to provide Evans with access to a civil court as a restraint upon her liberty are unavailing.

The *DeShaney* opinion was set in an eighth amendment context and thus, unlike the circumstances here, implied state custody. Thus, the failure of the police to inform Evans of her constitutional right of access to the appropriate civil court, for the purpose of filing a complaint or seeking a restraining order

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[3] *See Philadelphia Police and Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, Nos. 88-1883, 89-1116, slip op. at 21 (3d Cir. May 8, 1989), for an analysis of the "broad, harsh" *DeShaney* decision.

against the man who later killed her, do not rise to the level of a violation of the officers' constitutional duty to provide for her reasonable safety.

Accordingly, because the *DeShaney* doctrine precludes entitlement to special protection for persons not in state custody or under state deprivation of liberty, plaintiff's claims in Count Two must be dismissed.

4. Equal Protection for Victims of Domestic Violence (Count III)

Clearly, the Court's analysis of the actions of the police defendants under equal protection case law is intertwined with the policies of the Roselle defendants in training and setting standards. However, the Court will discuss the conduct of Schwartz and Grabowski first, in the knowledge that the standards employed must overlap.

a. The Hynson and Thurman Standards

Plaintiff alleges that the police officers' failure to perform their duties to protect Evans and to provide her with access to the courts pursuant to N.J.S.A. 2C:25-1 *et seq.*, violated Evans' right to equal protection of the law by discriminating against her and affording her lesser protection because she was the victim of domestic violence. When the state "distribute[s] benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection clause of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55, 60 (1982) (in the context of Alaska's distribution of surplus revenue).

In order to withstand the motion for summary judgment on this count of the complaint, plaintiff must show that the officers acted with discriminatory intent. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1971); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). The *Watson* court stated that failure to provide

equal police protection is subject to the equal protection clause under § 1983. (*Id.* at 694). *See also Thurman v. City of Torrington,* 595 F. Supp. 1521, 1527 (D. Conn. 1984) (held: law enforcement officers can be liable under § 1983 when by their inaction they fail to perform a statutorily imposed duty to enforce the laws equally and fairly).[4]

The *Thurman* court cited a well known pattern and policy of the defendant city to provide no protection to those who made complaints of domestic violence. (*Id* at 1529). The court required allegations of a pattern of deliberate indifference which caused plaintiff's compensable injury. (*Id.* at 1530). Such a pattern allows a court to infer discriminatory intent. Similarly, in *Arlington Heights*, the Supreme Court required that a discriminatory motive be alleged. In *Watson*, the court required the plaintiff to show evidence of specific facts that demonstrate a policy of the defendant to provide less protection, and in that case, the plaintiff developed statistics showing a nearly 100% higher arrest rate for perpetrators of nondomestic violence than for perpetrators of domestic violence.

Similarly, in *Hynson v. City of Chester,* 864 F.2d 1026 (3d Cir. 1988), the court held that "in order to survive summary judgment, a plaintiff must proffer sufficient evidence that would [sic] allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to

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[4] It is true that rights to equal protection are not violated simply by police failure to provide protection to a victim of domestic violence, but only by failure to provide protection to such a victim when ordinary crime victims *would* have received protection. However, it remains defendants' burden in this summary proceeding to establish that the undisputed facts and fair inferences therefrom allow no genuine dispute that Evans received the same treatment as an ordinary crime victim.

victims of domestic violence than to other victims of violence, that discrimination was a motivating factor and that the plaintiff was injured by the policy or custom." (*Id.* at 1031).

Here, the plaintiff alleges that the police officers' refusal to protect Evans after hearing her domestic violence report (Plaintiff's Br., Exh. C), coupled with their knowledge of her danger at the hands of her cohabitant and their failure ever to file a domestic violence report on *anyone's* behalf during the period from 1980 to September 1985 (DiGrazia Report, Plaintiff's Br., Exh. S at 7), satisfies the *Thurman* and *Hynson* standards for establishing discriminatory intent sufficient to withstand a summary judgment motion in an equal protection cause of action.

The Court notes that the allegation of failure to provide equal protection in the *third* count of this complaint is brought not against a police department (see analysis of the fourth count), but against two individual police officers. Plaintiff contends that the *individual* police officers knew of Evans' plight (*see* Plaintiff's Br., Exh. F at 20-22, 24-26 and Exh. G at 35-37), and that they denied her equal protection *because* she was a victim of domestic violence in direct violation of N.J.S.A. 2C:25-2. (*See* Grabowski Dep. at 152; Plaintiff's Br., Exh. D, in which this defendant admits never having filed a domestic violence report). In the absence of matter on the record that Grabowski also never filed an ordinary violence report or that another explanation exists for his failure to file a domestic violence report, defendants have not met their burden in a summary judgment proceeding to show that, as a matter of law, they did not violate Evans' constitutional right to equal protection.

b. Defense of Qualified Immunity

In this summary proceeding, qualified immunity is not available to defendants on the issue of equal protection to

victims of domestic abuse. Defendants' claim that reasonable police officers would not know that the policy (of failing to file any domestic violence reports during a five year period) would have a discriminatory impact on victims of domestic abuse strains credulity. *See Hynson v. City of Chester Legal Dep't.*, 864 F.2d 1026, 1032 (3d Cir. 1988). *See also* the treatment of domestic abuse in an equal protection context in *Thurman v. City of Torrington*, 595 F. Sup. 1521 (D. Conn. 1984).

Because plaintiff's substantial allegations of a pattern of discrimination by defendant Grabowski permits an inference of intent to discriminate against victims of domestic violence, the motion by Officers Grabowski and Schwartz for summary judgment on Count III of the complaint is denied. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

5. Failure of the Three Roselle Defendants to Train Subordinate Officers (Count IV)

The amended complaint states only one federal cause of action against Chief of Police Vincent Trolan, the Roselle police, and the Borough of Roselle. Plaintiff contends that the three Roselle defendants are liable for the acts of the two defendant officers who allegedly denied Evans access to the courts and failed to provide her with the protection she deserved as one with a "special relationship" with the police. (Amended Compl., ¶ 87). Plaintiff cites the Roselle defendants for their failure to train the officers to handle a variety of situations with the public, including providing citizens with access to domestic relations courts. (Amended Compl., ¶ 91). In summary, plaintiff alleges that the acts of the Roselle defendants constitute a policy, custom and practice (further evidence by incidents reported in the City of Roselle Council meetings) of which the result was to deny Evans her constitutional rights. (Amended Compl., ¶¶ 92, 93)

In determining whether a public entity, such as a municipality or a police force, is liable for a violation of a citizen's constitutional rights, the Court must first determine whether the individual officer's action, from which the public entity's liability potentially derives, itself amounted to a constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99 (1986). In earlier sections of this opinion, the Court denied summary judgment to the two police officers on the question of whether their failure to provide decedent Evans with special police protection, access to the domestic relations court, and equal protection of the law constituted violations of her constitutional rights. Therefore, under *Heller*, it is appropriate to analyze whether the Roselle defendants caused the police officers' failure, if any, to provide Evans with court access, as required by the New Jersey Domestic Violence Act.

The Supreme Court has repeatedly held that establishing the requisite nexus between the acts of an individual public employee and the public entity which employs him constitutes a difficult burden for a plaintiff. No *respondeat superior* or vicarious liability theories are available to the plaintiff under § 1983. *Monell v. Department of Social Services*, 436 U.S. 658, 694-95 (1978). To establish liability on the part of the public entity, the plaintiff must demonstrate affirmative links between the incidents of alleged police misconduct and the adoption of a municipal plan or policy showing the authorization of such misconduct. *Rizzo v. Goode*, 423 U.S. 362, 374-75 (1976). Similarly, in the seminal case of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court stated that the plaintiff's constitutional rights must have been violated by a municipality's unconstitutional custom or policy to trigger liability under § 1983. (*Id.* at 694-95). Further, "[i]t is only when execution of the government's policy or custom ... inflicts the injury that the municipality may be held liable under § 1983."

In *City of Canton v. Harris*, __U. S __, 109 S. Ct. 1197 (1989), the Supreme Court asked "what degree of fault must be evidenced by a municipality's inaction before liability will be permitted?" *Id.*, __U. S.__, 109 S . Ct. at 1204. The Court held that a "the inadequacy of police training [like that alleged by plaintiffs in the present case] may serve as the basis for § 1983 liability only where failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." (*Id.*) Only if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need," (*id.* at 1205), can the lack of training "fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury " (*Id.*)

In the present case, plaintiff alleges that Roselle Borough had a policy of failure to train officers like defendants Grabowski and Schwartz in handling situations of domestic violence and of failure to weed out incompetents. Plaintiff cites several instances of alleged police dereliction of duty to support her claim. (Amended Compl., ¶¶ 94-110). However, the only relevant allegation in this summary proceeding is that the officers failed to assist an undisputed victim of domestic violence to secure court protection. Some of the instances of alleged police failure and incompetence cited by plaintiff Brown are unrelated either to the handling of domestic violence complaints or to assisting victims of domestic violence to gain court protection.

The Court will make no attempt to evaluate the charges of municipal inadequacy encompassed by this list of alleged failures, even as substantiated by the DiGrazia report. (Plaintiff's Br., Exh. S). While charges of general inattentiveness and incompetence and failure to train may relate tangentially to failure of officers to perform duties of public

protection, the focus of the Court's analysis of city policy under § 1983 is properly limited to the causal *nexus* between any alleged past police failures, and the alleged failure by the police defendants to provide affirmative assistance to a particular victim of domestic violence. As stated in the previous section, plaintiff has substantiated her allegations that the Roselle defendants had (l) a policy of discriminating against victims of domestic violence, as shown by failure to train officers to deal with such situations, and (2) a policy amounting to indifference to a domestic violence victim's rights, as shown by failure to require the filing of even one domestic violence report during the period from 1980 to September 1985 (despite a written report to the Roselle police of another alleged victim of domestic violence). (*See* Mello Dep. at 31-40, Plaintiff's Br., Exh. P; Grabowski Dep. at 152, Plaintiff's Br., Exh. D).

Further, under the *Harris* standard, the duties assigned to the defendant officers to protect the public, including victims of domestic violence, may have rendered their inadequate training so "obvious" and "so likely to result in the violation of constitutional rights [like those set out in this opinion] that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." In this summary proceeding, it cannot be determined, as a matter of law, that "the failure to provide proper training" did not "represent a policy for which the city is responsible." *Harris*, __U.S.__ 109 S. Ct. at 1205.

Accordingly, this Court finds that the deficiency in Roselle's training is properly alleged and is sufficiently closely related to the ultimate injury of the plaintiff to satisfy the *Monell* and *Harris* tests. In other words, plaintiff's uncontroverted claim that *no* domestic violence reports, as required by N.J.S.A. 2C:25-1 *et seq.*, were kept by the Roselle police (Defendants' Answers to Plaintiff's Third Set of Interrogatories; Plaintiff's Br., Exh. R) sustains the nexus

requisite, as a matter of law, to preclude summary judgment in these charges of § 1983 liability against the municipality of Roselle and its police force and captain.

With regard to the events of the present case, the Court takes no position on the merits of plaintiff's contention that the defendants' failure to train demonstrates complete indifference to the needs of Debbie Evans. Nonetheless, the Court determines that plaintiffs have raised an inference of a causal link between the alleged denial of court access and equal protection by the two police officers in this case, and a Borough or police force policy implemented by Captain Trolan. Accordingly, as a matter of law, the defendants' motion for summary judgment on Count Four of the amended complaint is denied.

6. Common Law Negligent Failure to Protect an Identifiable Victim in Danger of Imminent Harm (Count V)

In the last count of the complaint plaintiff alleges that all the defendants conducted themselves in a negligent and wanton disregard to the safety of Debbie Evans, and that their actions were the proximate cause of her death. (Amended Compl., ¶121). Defendants claim immunity under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*

In *Wuethrich v. Delia,* 134 N.J. Super. 400 (Law Div. 1975), *aff'd*, 155 N.J. Super. 3244 (App. Div.), *certif. denied*, 77 N.J. 486 (1978), the court explored the framework for determination of liability by public employees under the Tort Claims Act. The court asked "(l) Was this, in fact, a wrong? (2) Was the government responsible for it? (3) Was it the kind of a wrong for which all the taxpayers should be held liable?" (*Id.* at 408). The court held that immunity was available only for high level discretionary acts by municipal employees (*id.* at 410), and that because the duty of police

officers to investigate after warnings are received is ministrial, not discretionary, that duty may not be avoided by resort to the Tort Claims Act. (*Id.* at 410-11).

In the case at bar, plaintiff's claims of negligence and disregard for safety against the two police officers stem from their alleged failure to protect Evans from imminent harm by McKenzie. Under the New Jersey Tort Claims Act, there is ordinarily no liability for injuries resulting from a police officer's failure to arrest, N.J.S.A. 59:5-5, or failure to provide police protection. (*Id.* 59:5-4). The *Wuethrich* court found that these kinds of acts were discretionary and necessarily resulted from differing evaluations of probable cause and from a choice among several possible apportionments of police resources. 155 N.J. Super at 326 (citing *State v. Royal,* 115 N.J. Super. 439 (App. Div.), *certif. denied,* 59 N.J. 294 (1971).

However, based on this Court's analysis of the affirmative duties imposed on police officers by the explicitly stated policy by the New Jersey Domestic Violence Act, N.J.S.A. 2C:25-2 (set forth in its entirety above), the Court finds that once they knew of the danger to Evans from her cohabitant (it is uncontested that Officer Grabowski knew of McKenzie's record (Grabowski Dep. at 59-71, 100-104, Plaintiff's Br., Exh. D; Evans Report, Plaintiff's Br., Exh. C), as well as of his absence from the drug rehabilitation center where he was confined and of the assaults and kidnapping he had allegedly perpetrated), the two police defendants here had an affirmative *ministerial* duty to assist Evans to secure court protection, to read her her right to file a civil complaint pursuant to N.J.S.A. 2C:25-7, and to investigate, pursuant to N.J.S.A. 59:2-3(d). No high level discretion, as described in *Wuethrich*, was required to obey the direct instruction of N.J.S.A. 2C:25-7, "A law enforcement officer shall disseminate to the victim the following notice, ... 'You have the right to go to the juvenile

and domestic relations court and file a complaint requesting relief....' "

The Court makes no prediction regarding the merits of the allegations in Count Five. On the basis of the Act's clear mandate to the police, however, the Court rejects plaintiff's contention that, as a matter of law, the failure of Officers Grabowski and Schwartz to inform Evans of her rights was immune from liability under the New Jersey Tort Claims Act. Therefore, the motion by defendants for summary judgment on Count Five is denied.

III. CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment is granted as to Count Two and is denied as to Counts One, Three, Four and Five.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: May 25, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REGINA BROWN, Administratrix and Administratrix-ad-Prosequendum of the Estate of DEBBIE EVANS,	:	
Plaintiffs,	:	
v.		
	:	Civil Action No. 86-4895
DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; et al.,	:	**ORDER**
Defendants.	:	

For the reasons set forth in the Court's opinion filed herewith,

It is on this 25th day of May, 1989,

ORDERED that defendants' motion for summary judgment is hereby granted as to Count Two of plaintiff's complaint; and it is further

ORDERED that defendants' motion for summary judgment is hereby denied as to Counts One, Three, Four and Five of plaintiff's complaint.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No. 90-1642

In The

Supreme Court of the United States

October Term, 1990

BOROUGH OF ROSELLE, FELIX GRABOWSKI and WILLIAM SCHWARTZ,

Petitioners,

v.

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

POINT I

THE COURT OF APPEALS CORRECTLY RULED THAT IT LACKED JURISDICTION OVER ALL ISSUES RAISED BY PETITIONERS' INTERLOCUTORY APPEAL OTHER THAN THOSE INVOLVING QUALIFIED IMMUNITY

Regina Brown filed this action pursuant to 42 U.S.C. § 1983, as administratrix of the estate of her sister Debbie Evans, alleging that Ms. Evans' constitutional rights were violated by members of the Roselle (New Jersey) police force and the Borough of Roselle, petitioners herein. The district court granted petitioners summary judgment on one count and denied summary judgment on the remaining counts – including petitioners' claims that they were entitled to qualified immunity. Petitioners appealed to the Third Circuit on the basis of this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which permits an immediate appeal from the denial of summary judgment on the ground of qualified immunity. Petitioners argued that the other issues – over which the court of appeals had no jurisdiction – should be addressed under the doctrine of pendent appellate jurisdiction.

Although the Court of Appeals for the Third Circuit found the individual police officers were entitled to qualified immunity, it determined that it lacked jurisdiction over the remaining issues, including the appeal by the Borough of Roselle, the Roselle Police Department and Chief Trolan in his official capacity [hereinafter "municipal defendants"] from the district court's refusal to grant

them summary judgment.[1] *Brown v. Grabowski*, 922 F.2d 1097, 1105 (3d Cir. 1990). The Third Circuit correctly found that it lacked jurisdiction over the appeal by the municipal defendants because the denial of a motion for summary judgment ordinarily is not a "final decision," and therefore, is not an immediately appealable order. *Id.*; *United States v. Spears*, 859 F.2d 284, 286 (3d Cir. 1988); *see* 28 U.S.C. § 1291.

Petitioners contend that the court of appeals should have entertained the issues appealed by the municipal defendants under the doctrine of pendent appellate jurisdiction. Moreover, petitioners seek to expand the scope of pendent appellate jurisdiction so that in practically all cases where a district court rejects the defense of qualified immunity on summary judgment, a defendant may appeal not only the qualified immunity question but also the remaining issues in the case. Without explicitly stating so, petitioner are, in effect, asking the Court to overturn well-established precedent of this Court. Respondent submits that the Third Circuit correctly declined to exercise jurisdiction over the issues unrelated to qualified immunity, and there is no overriding interest

---

[1] The municipal defendants, unlike the individual police officers, may not claim qualified immunity as a defense for the simple and irrefutable reason that a municipality has no immunity from liability for violations of constitutional rights. *Owen v. City of Independence*, 445 U.S. 622 (1980). Accordingly, the Third Circuit properly held that it did not have jurisdiction over the appeals by the municipal defendants. *Brown*, 922 F.2d at 1105; *see also Kraus v. County of Pierce*, 793 F.2d 1105 (9th Cir. 1986) (denial of county's summary judgment motion not appealable despite appeal by individuals pursuant to *Mitchell* exception), *cert. denied*, 480 U.S. 932 (1987).

which requires this matter to be addressed by this Court. Accordingly, the petition should be denied.

One of the few exceptions to the final judgment rule allows a party to appeal the denial of qualified immunity. *E.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Mitchell* expressly holds that "a district court's denial of a claim of qualified immunity . . . is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.* at 530. *Mitchell* thus represents an example of the "collateral order doctrine" which allows the appeal of a district court ruling prior to a final decision if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The denial of qualified immunity satisfies these criteria because it involves the right not to be subjected to trial, a right that would be negated were an official embodied with qualified immunity forced to undergo trial without the opportunity to appeal prior to a final decision. *Mitchell*, 472 U.S. at 526-27. The scope of the collateral order doctrine is limited and, as an exception to the final judgment rule, is not meant to be expanded. *Accord Mitchell*, 472 U.S. 511.

This Court previously has ruled on the issue of whether an otherwise nonappealable order may be decided along with an order properly appealed pursuant to the collateral order doctrine. *Abney v. United States*, 431 U.S. 651 (1977). For a court of appeals to address issues beyond the denial of qualified immunity, the additional

issues independently must satisfy the requirements for an interlocutory appeal, pursuant to either 28 U.S.C. § 1292 or the collateral order doctrine. *See id.* at 663. In *Abney*, a prisoner challenged his indictment for exposing him to double jeopardy and for failing to charge an offense. The Court held that the denial of the motion to dismiss the indictment on double jeopardy grounds fell within the "small class of cases" deemed "final decisions" pursuant to the collateral order doctrine of *Cohen*. *Id.* at 659. The guarantee against double jeopardy protects against being twice tried for the same offense, a right that would be irreparably lost if an individual were to be tried a second time before an appeal could be taken. *Id.* at 661-62. Nevertheless, the Court ruled that only the double jeopardy issue could be appealed on an interlocutory basis:

> [W]e, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well. . . . Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule.

Id. at 663. Thus, merely because one ruling is appealable under the collateral order doctrine does not mean that other decisions may piggyback along to be heard as well. *Id.*

The collateral order doctrine represents a significant but narrow exception to the requirement of finality that undergirds the federal legal system. Yet, petitioners seek to have the exception swallow the rule. As a result, litigants in § 1983 cases would be encouraged to raise spurious claims of qualified immunity which, when

denied, would enable them to appeal the entire controversy, and not simply the denial of qualified immunity. *Abney*, 431 U.S. at 663. One court has remarked on how appeals from denials of qualified immunity appear to have become "a routine part of every section 1983 case surviving a defense motion for summary judgment . . . often caus[ing] regrettable expense and delay." *Manhattan Beach Police Officers Ass'n v. Manhattan Beach*, 881 F.2d 816, 817 (9th Cir. 1989). Another potential misapplication could occur in cases appealed in accordance with the certification procedure of 28 U.S.C. § 1292. In that situation, once a question were certified by the district court and accepted by the court of appeals, nothing would stop an assertive defendant from bootstrapping related matters by invoking pendent appellate jurisdiction.

Petitioners assert that the doctrine of pendent appellate jurisdiction permits them to link the appeal of the municipal defendants to that brought below by the individual officers who successfully appealed the district court's denial of qualified immunity. Pendent appellant jurisdiction is proper in the following circumstances:

> When an ordinarily unappealable interlocutory order is inextricably entwined with an appealable such order, the former may be reviewed at the same time if, but only if, there are compelling reasons for not deferring the appeal of the former order to the end of the lawsuit, at which time all previous orders are appealable together with the final judgment.

Illinois ex rel. Hartigan v. Peters, 861 F.2d 164, 166 (7th Cir. 1988). Pendent appellant jurisdiction may be found only in a limited class of cases, *United States ex rel. Valders*

Stone & Marble, Inc. v. C-Way Constr. Co., 909 F.2d 259, 261 (7th Cir. 1990); *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988), and is a procedural device that rarely should be used because of the danger of abuse. *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 339 (2d Cir. 1987). A close relationship between the nonappealable order and the appealable order will not suffice; it must be practically indispensable that the merits of the unappealable order be addressed in order to resolve the properly-taken appeal. *Valders*, 909 F.2d at 262.

It is clear that the Third Circuit did not deem the appeal by the municipal defendants appropriate for invoking pendent appellate jurisdiction. *Brown*, 922 F.2d at 1106 n.3. The Third Circuit correctly applied its own precedent in following *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982), which held that the appeal of an order denying a preliminary injunction did not also encompass denial of a class certification order unless the preliminary injunction issue, appealable pursuant to 28 U.S.C. § 1292(a)(1), directly controlled the disposition of the otherwise nonappealable issue or was inextricably bound thereto. 670 F.2d at 449; *see Brown*, 922 F.2d at 1106 n.3. The concern militating against a broader application of the doctrine is the disruption of the functioning of the district courts by prematurely taking matters out of its hands. *Kershner*, 670 F.2d at 449. A mere nexus between the two issues is not sufficient to justify a decision to assume jurisdiction. *Id.* at 449-50; *see also Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 209 (3d Cir. 1990) (pendent appellant jurisdiction is not conferred to otherwise nonappealable orders simply because two orders arise out of same factual matrix, but is available

only to extent necessary to ensure meaningful review of appealable order).

Besides the Third Circuit, other courts have taken an equally narrow view toward the exercise of jurisdiction over claims pendent to collateral orders properly appealed. *E.g., Buckley v. Fitzsimmons*, 919 F.2d 1230, 1239 (7th Cir. 1990) (*Abney* tells us not to allow interlocutory appeals to acquire barnacles); *Newman v. Massachusetts*, 884 F.2d 19, 22 (1st Cir. 1989) (interlocutory review limited to issue of qualified immunity even when remaining issues in summary judgment motion are inexorably intertwined with qualified immunity issue), *cert. denied*, 110 S. Ct. 1132 (1990); *Illinois ex rel. Hartigan v. Peters*, 861 F.2d 164, 166 (7th Cir. 1988) (pendent appellant jurisdiction is not to be used for appeal of normally unappealable interlocutory orders that happen to be related, even closely related, to an appealable order); *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988) ("We can review an unappealable order only if it is so intwined with an appealable one that separate consideration would involve sheer duplication of effort by the parties and this court. (citation omitted) Any laxer approach would allow the doctrine of pendent appellant jurisdiction to swallow of the final-judgment rule"); *Intermedics Infusaid v. Regents of Univ. of Minn.*, 804 F.2d 129, 134 (Fed. Cir. 1986) (the major factor in determining whether to exercise pendent appellate jurisdiction is the extent that review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order); *see also Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539, 543 (3d Cir. 1977) (advocating a restrictive attitude toward examining

all issues in a controversy when only one is an appealable collateral order).

For some inexplicable reason, other courts of appeals fail to follow (or even mention) *Abney*. *E.g.*, *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1508-09 (11th Cir. 1990) (in appeal challenging denial of qualified immunity, court used discretion to assert pendent appellate jurisdiction over denial of eleventh amendment immunity); *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1105 (2d Cir.) (exercising pendent appellate jurisdiction though expressing concerns about circumventing procedural rules by allowing otherwise nonappealable order to ride coattails of appealable order), *cert. denied*, 111 S. Ct. 250 (1990).

Respondent submits that the standard applied by the Third Circuit in not exercising pendent appellate jurisdiction is consistent with precedent of this Court and should not be disturbed. *Brown*, 922 F.2d at 1106 n.3; *Kershner*, 670 F.2d at 449. However, the result reached by the Third Circuit in declining to exercise pendent appellant jurisdiction would be no different even had the Court adopted the three-part test articulated by the Tenth Circuit in *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991). *See* Petition at 17. Even under this admittedly looser standard, pendent appellant jurisdiction remains inappropriate in this particular situation. First, the nonappealable issue is not sufficiently developed for review since the matter reaches the Court on summary judgment with an incomplete record. *Cf. Bolden v. Alston*, 810 F.2d 353, 356 (2d Cir.) (where case already decided on merits, court may exercise jurisdiction to review liability determinations along

with denial of qualified immunity), *cert. denied*, 484 U.S. 896 (1987). Second, the Tenth Circuit's standard assesses whether the appealable and nonappealable issues involve consideration of closely related factors. In this case, the determination of whether the municipal defendants engaged in an unconstitutional practice, policy or custom involves a different analysis from that utilized in evaluating the conduct of the individual officers. The final factor in the Tenth Circuit's framework also is not satisfied because rather than serving notions of "judicial economy," review of the nonappealable issue unduly burdens the court of appeals and usurps the proper role of the district court. In addition, the benefits from the district court judge's unique insight and direct familiarity with the litigation would be lost. The court of appeals similarly would be deprived by the absence of a full record. Pendent appellate jurisdiction should not be exercised to undermine the essential role of the trial judge.

Petitioners further contend the claims against the municipal defendants are barred by the decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). Petition at 16-17. *Heller* is quite distinct from the matter now before the Court because in *Heller*, a jury had determined that the plaintiff suffered no constitutional harm by the defendant police officer. 475 U.S. at 798-99. The district court consequently dismissed the claim against the city, but the Ninth Circuit reversed. The Supreme Court simultaneously granted certiorari and reaffirmed the dismissal for the city, holding that in the absence of any harm of a constitutional magnitude to the plaintiff, the city could not be liable. *Id.* The decision by the Third Circuit in *Brown*, by contrast, merely ruled that the individual

police officers were qualifiedly immune from the claims against them because the asserted right was not clearly established at the time it was violated. The determination of qualified immunity, however, has no bearing whatsoever on the remaining claim against the municipal defendants. In fact, the record fully supports respondent's allegations that Debbie Evans' right to equal protection of the law was violated by the municipal defendants. Therefore, petitioners' reliance on *Heller* is misplaced.

In conclusion, petitioners have not adequately set forth sufficient reasons to justify issuance of a writ of certiorari. Petitioners' effort to ensnare the rule of finality by expanding the limited scope of the collateral order doctrine should be denied.

POINT II

THE COURT OF APPEALS CORRECTLY RULED THAT IT LACKED JURISDICTION TO REVIEW THE DISTRICT COURT'S DENIAL OF IMMUNITY TO PETITIONERS ON RESPONDENT'S STATE LAW CLAIMS

The Third Circuit held that it lacked jurisdiction to review the denial of immunity to petitioners on the pendent state tort claims against them. *Brown v. Grabowski*, 922 F.2d 1097, 1109 (3d Cir. 1990). The panel's reasoning was based on a determination that the denial of immunity under state law on a motion for summary judgment did not implicate the same concerns regarding immunity from suit as in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). According to the Third Circuit, the immunity provisions protecting police officers under New Jersey law provide immunity from liability rather than immunity from suit.

Petitioners erroneously contend that this ruling by the court of appeals creates a conflict among the circuits regarding the appealability of orders denying summary judgment on the basis of state law immunities. The reasoning of the court below is entirely consistent with those courts which have directly addressed this issue. In addition, petitioners' assertion that the court's analysis was contrary to Supreme Court precedent also is without merit.

In ruling that it lacked appellate jurisdiction to entertain petitioners' appeal based on the immunity defense raised pursuant to the New Jersey Tort Claims Act, the Third Circuit followed reasoning previously employed by the Fifth and the Sixth Circuits. *See Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988); *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986). In *Sorey*, the Fifth Circuit referred to Mississippi case law but found no express guidance to determine whether the issue of qualified immunity under state law was a defense to liability or an immunity from suit. 849 F.2d at 962. The Fifth Circuit then properly considered state procedural law as relevant for what it revealed about the state's view on the substantive issue of whether the state immunity provided immunity from suit or merely a defense to liability. *Id. Sorey* concluded that a denial of immunity invoked under Mississippi law was appealable in accordance with the collateral order doctrine because a variety of considerations revealed that it, like the federal doctrine, provided immunity from suit. *Id.* at 963.

Through the same reasoning, the Sixth Circuit found no indication that Michigan's doctrine of immunity included a right to be free from trial. *Marrical v. Detroit*

News, Inc., 805 F.2d at 172. The court's discussion there focused on the inconvenience and cost of piecemeal litigation and distinguished Michigan's immunity provision from federal qualified immunity. *Id.* at 174. The court assessed the issue from the following perspective – the same standard later utilized in *Sorey*:

> We conclude that the right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended an underlying substantive right to the defendant official to be free from the burdens of litigation arising from acts taken in the course of his duties.

Id. at 172; *Sorey*, 849 F.2d at 962. The Sixth Circuit found that the law in Michigan on this issue did not afford state officers immunity from suit, but rather merely from liability. The court concluded as follows:

> We are reluctant to expand the small class of immediately appealable interlocutory orders without this clear statement of the compelling benefit to be achieved sufficient to justify imposing on litigants the burdens and delays of interlocutory appeals.

Id. at 174. The Third Circuit similarly found that New Jersey law took a disfavored view toward interlocutory appeals and thus declined to extend jurisdiction over the appeal on the state law claim. *Brown*, 922 F.2d at 1108-09.

Petitioners' contention that the analysis in *Brown* by the Third Circuit deviates from this Court's decision in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), is meritless. *Budinich* held that the assessment of whether an order is an appealable "final decision" under 28 U.S.C. § 1291 is to be governed by federal law. The discussion in

Brown addressing the appealability of the denial of state law immunity is prefaced by reference to *Budinich*:

> One implication of the Court's decision in *Budinich* is that our decision on the appealability of the district court's denial of defendants' motion for summary judgment should be governed solely by section 1291 as interpreted in *Mitchell*.

922 F.2d at 1106; *see also Sorey*, 849 F.2d at 962 (citing *Budinich*); *Marrical*, 805 F.2d at 172 ("the parties are bound by the federal procedural rules governing appeals, including the strictures of the collateral order doctrine"). The Third Circuit's opinion below is entirely consistent with *Budinich* because the opinion analyzes appealability within the parameters of the collateral order doctrine, referring to state law only to ascertain whether the state immunity was comparable to federal qualified immunity. Contrary to petitioners' contention, the holding by the court below conforms with *Budinich*, and it does not create a split among the circuits on the factors to be considered in assessing whether state law immunity provides immunity from suit or from liability. The divergent outcomes in *Brown*, *Sorey* and *Marrical* have nothing at all to do with a conflict among the circuits, but instead are a result of varied state statutes and particularized interpretations by their respective state courts and legislatures. The Third Circuit interpreted the appealability of the denial of immunity under state law in accordance with federal procedure, as required.

The crux of the analysis, though, is whether the state immunity extends to protect state officials from suit or from liability. To that end, petitioners ask that this Court rule upon a question solely involving New Jersey law yet

impose a uniform rule to review varied immunity provisions implemented by the several states. In essence, petitioners request that this Court decide for each of the individual states how their separate and distinct immunity provisions should be interpreted, clearly an inappropriate basis on which to seek a writ of certiorari.

Furthermore, immunity under the New Jersey Tort Claims Act is conceptually distinct from federal qualified immunity, and, hence, does not fall within the narrow exception carved out in *Mitchell v. Forsyth*. Since there is no evidence that New Jersey tort law immunities offer an entitlement not to undergo trial, as opposed to immunity from liability, petitioners' assertions pertaining to immunities under the New Jersey Tort Claims Act are not appealable. In fact, as the Third Circuit recognized, the many sections of the Act that address immunity speak solely in terms of immunity *from liability* and not of immunity from suit. *Brown*, 922 F.2d at 1108 (citing examples of provisions within New Jersey Tort Claims Act phrased in terms of immunity from liability). The court also properly turned to New Jersey case law and concluded that while no decisions address the issue of immunity from suit as *Mitchell v. Forsyth* does, "it seems noteworthy that they do speak explicitly in terms of immunity from a *liability*." *Id.* at 1108 (emphasis in original); *see, e.g., Rochinsky v. State of N.J. Dep't of Transp.*, 110 N.J. 399, 408 (1988) ("Even when one of the Act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity"); *Lee v. Doe*, 232 N.J. Super. 569, 581 (App. Div. 1989) (New Jersey Tort Claims Act, and corresponding California act on which it is based, provide *immunity from*

liability); *see generally* Report of the Attorney General's Task Force on Sovereign Immunity (May 1972).

Petitioners also could have sought to appeal this aspect of the district court's decision under 28 U.S.C. § 1292(b) which permits appeal of an otherwise nonappealable order that involves a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Petitioners have waived their opportunity to now raise any argument that the court of appeals should have exercised jurisdiction over this issue by failing to obtain such certification from the district court within ten days after entry of the order as permitted under the rules.

Therefore, since the decision below by the Third Circuit does not conflict with this Court or with any of the courts of appeals, and because the issue raised by petitioners does not involve an important question of federal law, but rather a question of state law, this matter is not appropriate for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BOROUGH OF ROSELLE, FELIX GRABOWSKI and WILLIAM SCHWARTZ,

Petitioners,

vs.

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

PETITIONERS WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF THE WIDE SPLIT AMONG THE CIRCUITS ON THE ISSUE OF PENDANT APPELLATE JURISDICTION

In response to Petitioners' Petition for Writ of Certiorari, Respondent argues that the Court below correctly refused to

exercise pendent appellate jurisdiction over the claims of the municipal defendants, but ignores the wide range of opinions among the Circuits as to the extent of pendant appellate jurisdiction on appeals under *Mitchell v. Forsyth*, 472 U.S. 511 (1985). For the reasons set forth below, and in their petition, Petitioners' request for a Writ of Certiorari should be granted.

Under Supreme Court Rule 10.1(a), one of the issues the Court will consider in granting a writ of certiorari is a conflict of decisions among the Circuits. Respondent has simply attempted to sweep away the wide range of conflicting opinions among the Circuits as to the extent of pendant appellate jurisdiction by ignoring decisions of other Circuits which are contrary to the narrow view of the Third Circuit. Respondent's cite to cases in the First, Third and Seventh Circuits, (*See* Opposition Brief at 7) which support a narrow view of pendant appellate jurisdiction, while ignoring cases from the D.C., Federal, Second, Eighth, Tenth and Eleventh Circuits which give considerably broader range for pendant appellate jurisdiction. (*See* Petition at 10-16).

Respondent also contends that the question of pendant appellate jurisdiction has previously been decided by this Court in *Abney v. United States*, 431 U.S. 651 (1977). However, *Abney* dealt with the question of what ancillary questions, if any, were to be considered in an appeal from a denial of a motion to dismiss an indictment on the basis of double jeopardy in a *criminal* case. The "inexplicable reason" that *Abney* has been ignored by the Circuits in ruling on pendant appellate jurisdiction on appeals under *Mitchell* is that *Abney* was a criminal, not a civil, appeal. Nonetheless, if *Abney* is the law with regard to pendant appellate jurisdiction in civil cases, which it should not be, the solution is for the Court to grant Petitioners' Writ for Certiorari and state, once and for all, what the law is, rather than allowing the crazy quilt of opinions which currently exist in the Circuits to remain in place.[1]

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[1] Respondent also contends that Petitioners could not meet the test for exercising pendant appellate jurisdiction as set forth in *Colorado v. Idarado Mining*

(Footnote continued)

For the reasons stated herein, and in the Petition for Writ of Certiorari, there is a wide range of opinions in the Circuits as to the extent of pendant appellate jurisdiction in appeals taken pursuant to *Mitchell*. This is an important issue in the area of civil rights litigation which should be settled by this Court. Further, the reasoning which underlies pendant appellate jurisdiction for appeals under *Mitchell* would apply equally to appeals taken under 28 U.S.C. §1292(a). Therefore, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Co., 916 F.2d 1486 (10th Cir. 1990), because the record is incomplete. (Respondent's brief at 8). That contention is preposterous. The record on Petitioners' motion for summary judgment consisted of over 1000 pages of deposition testimony, including the full transcripts of the depositions of Ptl. William Schwartz, Det. Felix Grabowski, Chief Vincent Trolan (all of whom were named as defendants), Det. Harold Geyer of the Roselle Police Dept., Asst. Prosecutor William Daniel, Raymond Trolan, who was Chief of the Roselle Detective Bureau, Regina Brown, respondent herein, Tracy Evans, Debbie Evans' brother, Sgt. William Mello of the Union County Prosecutor's Office who investigated Roselle's Detective Bureau, as well as the trial testimony of Clifton McKenzie, who murdered Debbie Evans.

II

THIS COURT SHOULD SET STANDARDS FOR INTERLOCUTORY APPEALS FROM DENIAL OF STATE LAW IMMUNITY

Petitioners also seek review of the Third Circuit's holding that it did not have jurisdiction to hear their appeal from the District Court's denial of summary judgment on state law immunity. As is set forth in their Petition, the Third Circuit created a split among the circuits as to the factors to be considered in deciding the appealability of a denial of state law immunity by improperly considering the appealability of such an order under state appellate rules, contrary to *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Petitioners are not, as Respondent contends, seeking to have the Court "decide for each of the individual states how their separate and distinct immunity provisions should be interpreted." Petitioner simply seeks to have this Court set standards to enable the lower federal courts to interpret state immunity laws in a situation, where an interlocutory appeal is proper under Federal procedure rules, which most states did not contemplate when the immunity laws were enacted.

For the reasons set forth in the Petition, the appealability of a denial of state law immunity is an important issue which should be decided by this Court. Therefore, Petitioners respectfully request that their Petition for Writ of Certiorari should be granted.

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